PERBADANAN PENGURUSAN TRELLISES & ORS v. DATUK BANDAR KUALA LUMPUR & ORS

COURT OF APPEAL, PUTRAJAYA
MARY LIM JCA
HAS ZANAH MEHAT JCA
S NANTHA BALAN JCA
[CIVIL APPEAL NO: W-01(A)-712-12-2018]
27 JANUARY 2021
[2021] CLJ (JT2)

CIVIL PROCEDURE: *Judicial review – Certiorari – Locus standi – Application for judicial review against decision of local authority/Datuk Bandar – Datuk Bandar issued development order affecting public park – Datuk Bandar issued notice of development plan and invited comments/objections – Management corporations, joint management body and residents ('objectors') objected against proposed development – Objections voiced out in hearing – Whether objectors had legitimate expectation that subject land would remain as public open space, recreational, sports and green area and city park – Whether objectors had requisite locus standi to commence judicial review proceedings to challenge decision of Datuk Bandar – Whether objectors adversely affected by development order issued – Rules of Court 2012, O. 53*

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Locus standi – Decision of local authority – Application for judicial review against decision of Mayor/Datuk Bandar – Datuk Bandar issued development order affecting public park – Datuk Bandar issued notice of development plan and invited comments/objections on proposed development – Management corporations, joint management body and residents ('objectors') objected against proposed development – Objections voiced out in hearing – Whether objectors had legitimate expectation that subject land would remain as public open space, recreational, sports and green area and city park – Whether objectors had locus standi to attend hearing – Whether objectors had locus standi to commence judicial review proceedings to challenge decision of Datuk Bandar – Whether objectors adversely affected by development order issued – Whether procedures for approval or rejection of planning permission complied with – Whether Datuk Bandar's decision tainted with illegality, irrationality and procedural impropriety – Planning (Development) Rules 1970, rr. 5(3) & 5(8)*

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Decision of local authority – Judicial review against decision of Mayor/Datuk Bandar – Datuk Bandar issued development order affecting public park – Datuk Bandar issued notice of development plan and invited comments/objections on proposed development – Management corporations, joint management body and residents ('objectors')*

objected against proposed development – Objections voiced out in hearing – Datuk Bandar later issued development order for proposed development without communicating decision to certain objectors and without proffering reasons – Whether Datuk Bandar had duty to inform objectors of decision and proffer reasons – Whether procedures for approval or rejection of application for planning permission complied with – Whether Kuala Lumpur Structure Plan 2020 and draft of Kuala Lumpur Local Plan 2020 valid and binding – Whether Datuk Bandar took plans into consideration before arriving at decision to issue development order – Whether there was conflict of interest between Datuk Bandar and applicants for development – Whether Datuk Bandar's decision tainted with illegality, irrationality and procedural impropriety – Whether Datuk Bandar's decision ought to be quashed – Federal Territory (Planning) Act 1982, ss. 16, 22(1) & 22(4)

The present appeal centered around a development order, issued by the Datuk Bandar of Kuala Lumpur ('Datuk Bandar'), which affected Taman Rimba Kiara, a public park nestled within Taman Tun Dr Ismail ('TTDI') and Bukit Kiara, Kuala Lumpur. Taman Rimba Kiara was developed by the local authority of Kuala Lumpur as a public open space, green area and recreational area for the general public, in accordance with the gazetted Kuala Lumpur Structure Plan 2020 ('KL Structure Plan') and the draft Kuala Lumpur Local Plan 2020 ('KL Local Plan'). In June 2016, the first respondent, the Datuk Bandar, notified the public through a notice that it had received an application for planning permission to develop, *inter alia*, a block of affordable apartments and eight blocks of luxurious service apartments with an eight storey podium carpark, on a piece of land in Bukit Kiara ('subject land'). The subject land was to be developed by Memang Perkasa Sdn Bhd ('third respondent'), following a joint venture agreement ('JVA') it had entered into with Yayasan Wilayah Persekutuan ('second respondent'). Although the subject land was yet to be alienated to the second respondent at the time of the entry into the JVA, the second respondent agreed that vacant possession of the land would be delivered to the third respondent upon the execution of the JVA. The title to the subject land was issued in 2014. In 2015, the third respondent applied to the Datuk Bandar for planning permission for the development. The Datuk Bandar issued notice of the development plan and an advertisement was carried in the local newspapers, inviting comments or objections with respect to the proposed development. The appellants objected to the proposed development on the ground that it would significantly increase the density of TTDI and irreversibly degrade Taman Rimba Kiara as a green lung. The Datuk Bandar issued a notice of hearing and a hearing was convened and attended by the representatives of the first, second and sixth appellants, and other residents of TTDI, who all voiced out their objections against the proposed development. At the hearing, the appellants learnt that the proposed development also included a proposal

and/or plan to construct a new flyover together with a highway-cum-expanded road network in TTDI; this was not specified in the notice issued by the Datuk Bandar. Following the hearing, the first, second and sixth appellants wrote to the respondents to reiterate their objections but this was met with no response. It was only in April 2017, the following year, that the Datuk Bandar informed the first and second appellants that the proposed development was still under evaluation and they would be informed once a decision had been made. However, in July 2017, without any clarification on the status of the proposed development or any notice, the appellants discovered that (i) the third respondent was carrying out survey works at Taman Rimba Kiara; (ii) conditional planning approval for the proposed development had been granted; and (iii) a development order was granted for the proposed development.

The appellants commenced a judicial review application, at the High Court, seeking (i) orders of *certiorari* to quash the conditional planning approval and the development order on the grounds that (a) the decisions were tainted with illegality, irrationality and procedural impropriety; and (b) the appellants had a legitimate expectation that the subject land would remain as a public open space, recreational, sports and green area and a city park; and (ii) an order of *mandamus* directing the Datuk Bandar to adopt the KL Local Plan and to publish the adoption in the *Gazette* pursuant to s. 16 of the Federal Territory (Planning) Act 1982 ('Act'). In support of their application, the appellants submitted that, *inter alia*, (i) rule 5(8) of the Planning (Development) Rules 1970 ('Rules') requires the Datuk Bandar to convey to the relevant persons a written decision on the application and the objections raised. There was procedural impropriety in that r. 5(8) of the Rules had not been complied with as no reasons were given to the appellants for the Datuk Bandar's decision; (ii) the Datuk Bandar's decision contravened s. 22(1) of the Act when it failed to consider the KL Structure Plan and the KL Local Plan in that under the KL Structure Plan, the subject land had been demarcated as a public open space, recreational and sports area, green area and city park; whilst the KL Local Plan had demarcated Taman Rimba Kiara as a city park and public open space with zero development intensity; (iii) there was a conflict of interest because the Datuk Bandar was a member of the Board of Trustees of the second respondent and the application for planning permission was made in the joint names of the first and second respondents. Deciding in favour of the respondents, the High Court dismissed the appellants' application on the grounds that: (i) there was nothing to show that the appellants were the registered owners of the lands adjoining the subject land, as required under r. 5(3) of the Rules, for the appellants to be entitled to mount a challenge; (ii) the duties and powers of the first to fourth appellants, which were management corporations, and the

fifth appellant, a joint management body, were only in relation to the common property and these bodies only had duties and powers confined to the common property located within their respective properties; (iii) since the appellants lacked the requisite *locus standi*, the provisions of the Rules requiring the affected persons to be informed of the decision of the Commissioner was inapplicable. In any case, the first, second and sixth appellants had been informed of the decision to grant the development order on 20 July 2017. Furthermore, both the Act and Rules do not impose any statutory duty to give reasons; (iv) since judicial review pertains to the decision-making process as well as its legality, rationality and reasonableness in arriving at the said decision, r. 5(8) of the Rules did not apply as it related to an act after the decision had been made; (v) the Datuk Bandar's decision was not in contravention of s. 22(1) of the Act when it failed to consider the KL Structure Plan and the KL Local Plan; (vi) Section 22(1), read together with s. 22(4) of the Act, was also not infringed. The Datuk Bandar had considered all pertinent matters including the KL Structure Plan and adhered to it. The words 'to have regard to', in s. 22(1) of the Act did not mean 'to adhere strictly or slavishly'; (vii) the issue of non-compliance with the KL Local Plan did not arise as it had not come into effect and had yet to be finalised; (viii) whilst the Datuk Bandar was one of the members of the Board of Trustees of the second respondent, the development order was not signed by the Datuk Bandar. Further, the Datuk Bandar did not sit in any of the meetings in relation to the application nor was he involved in the decision-making process to approve the application; (ix) the issuance of the development order was in accordance with the procedures and requirements under the Act and the Rules; and (x) the appellants' expectation was mere expectation not recognised by law and, as such, not a legitimate expectation. Hence, the present appeal.

Held (allowing appeal; issuing order of *certiorari* quashing decision of first respondent granting development order in relation to proposed development of subject land)

Per Mary Lim JCA delivering the judgment of the court:

(1) Rule 5(3) of the Rules recognises only a certain category of persons who have a right to object to any proposed development on or to any adjoining land. In such event, this category of persons have a right to be notified of the impending or proposed development and also a right to attend a hearing and voice their objections or concerns. The requirements of r. 5(3) of the Rules have already or ought to have been attended to at the hearing because it was at the hearing that the Commissioner would or should decide whether the objectors were the proper persons to attend and raise their objections to the proposed development. Rule 5(3) of the Rules is relevant to the question of *locus*

standi at hearings or inquiries conducted by the Commissioner under the Rules. However, r. 5(3) of the Rules is not relevant for the purpose of determining *locus standi* in relation to the application for judicial review. The respondents must not conflate the two separate *locus standi* requirements. (paras 61, 73 & 74)

(2) The objection on lack of *locus standi* was without merit. The application was an application for judicial review where the provisions of O. 53 of the Rules of Court 2012 ('ROC') applied. The ROC was made pursuant to the Courts of Judicature Act 1964 which expressly provided for the supervisory jurisdiction of the court to judicially review decisions of inferior or subordinate bodies and the Executive such as the Datuk Bandar. The impugned decision was made by the Datuk Bandar, who was a public authority. Order 53 r. 2(4) of the ROC (i) expressly allows persons who are adversely affected by the decision made by a public authority to initiate judicial review applications; and (ii) does not require such persons to further establish their right under specific law before they are entitled to initiate judicial review proceedings. There is only one test; whether the appellants were adversely affected by the impugned decision. (paras 65-67 & 75)

(3) The appellants had the requisite *locus standi* to initiate the judicial review proceedings because they had real and genuine interests in the subject matter of the judicial review which was the effect the impugned decision had on them. The appellants had amply shown that they were adversely affected by the impugned decision in that they were residents, owners and/or occupiers of the properties located within the immediate vicinity of the proposed development and were users of Taman Rimba Kiara where the subject land was located. The planning permission sought was not over a relatively minor development. The proposed development would, directly and indirectly, impact the appellants in the multifarious ways described by them – from the use and value of their properties to the traffic or egress and ingress in relation to their properties and the simple matter of use of Taman Rimba Kiara, more so given the magnitude of the proposed developments that impacted directly on the density of population in their area. The effects were unquestionably irreversible, permanent and far-reaching. (paras 76, 77 & 92)

(4) As a society representing the residents of TTDI, the sixth appellant undoubtedly had the requisite *locus standi* to bring the judicial review application. Section 39(3) of the Strata Titles Act 1985 expressly cloaks the first five appellants with the legal capacity to sue and these appellants narrated that their action was representative for the

proprietors of the respective properties for which they were the management corporations or joint management corporation. This representative action was permissible under O. 15 r. 12 of the ROC. Otherwise, all the owners of the units would have to be named as applicants. It should also be noted that the first, second and sixth appellants were served notices to attend the hearing under r. 5(3) of the Rules. The Datuk Bandar treated and accepted them as objectors and their presence was not objected to at the hearing. (paras 76, 80 & 86)

(5) The Datuk Bandar, as a local authority, owed a duty at common law to notify and hear objections from adjoining landowners in order to be regarded as having acted fairly in making its decision. There could only be proper and effective planning in the area of the local authority if the owners or residents of properties in the vicinity of the proposed development are consulted or heard before such application for planning permission is decided one way or another. Where these persons have been kept in the dark, it could not be denied that they have been adversely affected. (paras 78 & 79)

(6) Judicial review pertains to reviewing the decision reached by examining if the relevant law and procedure have been complied with without any breach of the rules of natural justice; that there has been fair play and that the parties concerned have been given an opportunity to be heard and to address the relevant matter under consideration before the decision is reached. The review does not stop at the door of the decision; it extends to the decision itself and how or whether that decision was ever communicated to the persons affected by the decision – adversely or otherwise. In the process, the contents of the decision will come under scrutiny. The court must not artificially draw an imaginary line restricting the court's powers to judicially scrutinise the administrative decision of the Datuk Bandar. These powers are exercised in the public interest and for public good and, insofar as the Datuk Bandar was concerned, for better administration of duties and powers conferred by the relevant legislation. The burden, in public law, would be on the Datuk Bandar to show how the process had been adhered to and not the other way round. (paras 104 & 105)

(7) The Datuk Bandar opined that there was no duty to inform the appellants due to their lack of *locus standi*. However, the facts showed that the Datuk Bandar took no issue at any time until the judicial review proceedings were filed. This made the Datuk Bandar's position quite inconsistent; more so when the Datuk Bandar failed to notify some of those who attended the hearing the outcome of their objections raised at the hearing. There was a duty on the Commissioner, which

was the Datuk Bandar, to inform those who attended of the decision made, the outcome of the hearing and the response to their objections and/or concerns. The presence of r. 5(8) of the Rules amplified this requirement especially in relation to the applicant for planning permission and to those who objected. Since the other appellants were not informed of the decision, there was clearly procedural impropriety in the decision reached which rendered the development order granted, liable to be quashed. (paras 106-108)

(8) The absence of an express provision in any statute requiring the decision-maker to give reasons does not mean that the duty does not exist unless and until the statute specifically states so. Case laws have developed progressively to instil an innate will on public authorities to explain their decisions. In the present appeal, there could only be responsible and proper planning if the Datuk Bandar, who approves or rejects any permission, explained his reasons to all concerned; especially the appellants. There was a duty to give reasons, without it being expressly provided in the Act or the Rules, due to the presence of an elaborate mechanism for notification of hearing, invitation to a hearing to express concerns or views before a decision is made on a planning application. The procedure tells the public, including the appellants, this is how it will act when there is an application. It made no sense to have such a procedure statutorily provided yet not adhered to. Having held out to the appellants the procedure to which they responded to, the Datuk Bandar could not sit back, fold his arms and say that he was not required to explain or honour the practice unless there was a good reason not to do so. (paras 113-115)

(9) The KL Structure Plan has been around for over 20 years. The object of all these plans are for proper control and regulation of planning of the development and use of all lands and buildings in the area of the local authority. Lives and economies and the way of living are planned around the KL Structure Plan, whether of long or short duration. The KL Structure Plan guides the Datuk Bandar on how a decision on any application for planning permission to develop any area in the capital city will be approached, considered and dealt with. The residents of Kuala Lumpur, including the appellants, rely on these plans. It would be fair to say that there is a certain measure of expectation that the details in the KL Structure Plan, in particular the lands as demarcated, would be honoured. If there is to be any change, there would be full consultation, clarification or explanations and accountability. From the terms of s. 22(4), read with s. 22(1) of the Act, the KL Structure Plan, as was the case with the comprehensive development plan

('CDP') and the KL Local Plan, could not be disregarded by anyone, least of all, the Datuk Bandar. It forms the basis for approval or rejection of any application for planning permission, or to impose conditions for such decisions of approval. (paras 144, 146 & 147)

(10) Section 22(4) of the Act confers the Datuk Bandar, as the Commissioner, a discretion in relation to whether an application for planning permission ought to be favourably or otherwise considered, with or without terms and the nature of those terms to be imposed. This discretion is not unfettered. In the context of s. 22(4) of the Act, and this is recognised in s. 22(1) itself, the expression used is 'shall'. The Datuk Bandar is directed to take into consideration such matters as are expedient or necessary for the proper planning of the development, and the local area. Even in that regard, it is not open-ended. The Datuk Bandar is specifically directed to have regard to the provisions of the development plan and where the local plan has not been adopted, the CDP; and any other material consideration. Clearly and quite obviously, the CDP, structure plan and local plan are material considerations. If these plans were not taken into regard at the material time, the decision reached is invalid; and no reason or explanation given later at the judicial review proceedings could change that as it must be apparent from the decision communicated to the appellants how the concern about the KL Structure Plan was addressed. (paras 151 & 152)

(11) It was difficult to see how the KL Structure Plan could be said to have no legal binding effect on anyone. The Commissioner, the Datuk Bandar, was bound to have regard to the CDP, the KL Structure Plan and the KL Local Plan in the consideration of any application for planning permission. The requirement of taking the plans and material considerations into account was a question of law but what weight the Datuk Bandar chose to give to each of the matters in the KL Structure Plan *etc* was a matter of planning judgment. If the Datuk Bandar did not explain this aspect carefully, or merely asserted that the plans had been taken into account without more, the reasonable conclusion was that there had been no proper compliance of the law. It was imperative on the part of the Commissioner, the Datuk Bandar, to ensure that the application for planning permission was consistent with such plans and to decide what conditions to impose if it was not, or even to reject or suspend such application where there is no such plan. Any departure from the KL Structure Plan must be for good reason and such reason has to be properly explained in writing at the material time of decision. (paras 154 & 155)

(12) It was not in dispute that the subject land was demarcated as a public open space, recreational and sports area, green area and city park while under the KL Local Plan, Taman Rimba Kiara was demarcated as a city park and public open space with zero development intensity. It was apparent from the proposed development that both status would be permanently affected. How the Datuk Bandar proposed to address this aspect, which was also raised by the appellants in their objections, was not at all clear from the decision reached and from the letter dated 20 July 2017. There was no reference, direct or indirect, to the KL Structure Plan or even to the KL Local Plan or CDP. With the serious concerns and objections raised by the appellants under these plans, and having given the appellants and other residents a hearing, at the very least, the Datuk Bandar could have addressed these concerns in the written reply. (paras 164 & 167)

(13) The respondents cited the relocation or the housing of the Bukit Kiara Longhouses as reason for the grant of the development order; that it was in their interest and for their welfare. It could not be seen how the matter of Bukit Kiara Longhouses was a planning issue. It was a legacy or political issue which had no place in the considerations that the Datuk Bandar was required to take into account in exercising discretion under s. 22 of the Act. The development order, granted with such extensive change to or contrary to the KL Structure Plan, required strict compliance of the procedure as set out in the Act and the Rules. The development order was also disproportionate to the purported resolution of the matter of the Bukit Kiara Longhouses. For planning purposes, the category of use as specified in the title documents was not the paramount consideration here; what was relevant was the development to which the second and third respondents proposed to make in relation to the subject land and how it is regulated by the Act. The High Court Judge was plainly in error in failing to hold that the Datuk Bandar had not exercised his discretion in accordance with the law when making the impugned decision. The impugned decision must be quashed. (paras 171-175)

(14) From the terms of the JVA, there were more than sufficient terms to fetter the discretion of the Datuk Bandar when it came to considering the application for planning permission of the proposed development and in securing a development order. Certain clauses clearly indicated that the second respondent's interests, commercial and financial, were entirely dependent on the proposed development being approved. Without such approval, there would be no joint venture, nothing to develop and no financial gain. (para 188)

(15) The chronological records of how the development order came to pass, how the process and circumstances of the grant of the development order was facilitated, the details of the JVA and the involvement of the Datuk Bandar, were amongst the paramount reasons why the court found further evidence of the existence of conflict of interest in addition to the findings of procedural irregularity. No matter how the Datuk Bandar attempted to separate or distance himself from the JVA and also from the impugned decision and now claiming that the development was to relocate the Bukit Kiara Longhouses, it was undeniable that the terms of the JVA, looked at as a whole, all pointed inexorably to the existence of a conflict of interest. The obligation or responsibility to relocate the Bukit Kiara Longhouses had nothing whatsoever to do with the second respondent. The second respondent, in relation to the occupiers of the Bukit Kiara Longhouses, was purely in a contractual relationship with them *vide* master resettlement agreement, entered by virtue of the fact that it was a registered landowner wanting these persons to vacate the subject land for the proposed development. The third respondent then proceeded to apply for the planning permission using the power of attorney given to it by the second respondent. When the Datuk Bandar claimed that the development order was granted for the sake of relocating the Bukit Kiara Longhouses, it actually lent weight to the allegation that there was a conflict of interest in the terms complained of. The development order must be set aside. (paras 189-191)

Case(s) referred to:

Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805 CA ***(refd)***

Amber Court Management Corporation & Ors v. Hong Gan Gui & Anor [2016] 2 CLJ 751 CA ***(refd)***

Anderton & Others v. Auckland City Council & James Wallace Pty Ltd [1978] 1 NZLR 657 ***(refd)***

Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1948] 1 KB 223 ***(refd)***

Badan Pengurusan Tiara Duta v. Timeout Resources Sdn Bhd [2014] 8 CLJ 133 CA ***(refd)***

Bath Society v. Secretary of State for the Environment & Others [1992] 1 All ER 28 ***(refd)***

Buxton And Others v. Minister of Housing and Local Government [1960] 3 All ER 408 ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 All ER 935 ***(refd)***

Datin Azizah Abdul Ghani v. Dewan Bandaraya Kuala Lumpur & Ors And Another Appeal [1992] 1 LNS 28 SC ***(refd)***

Dato' Mohamad Yusof A Bakar & Anor v. Datuk Bandar Kuala Lumpur [2019] 1 LNS 1494 CA ***(refd)***

Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248 CA ***(refd)***

District Council Central, Province Wellesley v. Yegappan [1966] 1 LNS 46 FC ***(refd)***

Dr Stefan v. The General Medical Council [1999] 1 WLR 1293 ***(refd)***

F & D Bonaccorso Pty Ltd v. City of Canada Bay Council (No. 2) [2007] NSWLEC 537 ***(refd)***

Government Of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Gregory and Other v. London Borough of Camden [1966] 2 All ER 196 ***(refd)***

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2017] 4 CLJ 265 FC ***(refd)***

Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors And Other Appeals [1997] 4 CLJ 253 CA ***(refd)***

Lee Freddie & Ors v. Majlis Perbandaran Petaling Jaya & Anor [1994] 1 LNS 212 HC ***(refd)***

Lower Hutt City Council v. Bank [1974] 1 NZLR 545 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Majlis Perbandaran Subang Jaya v. Visamaya Sdn Bhd & Anor [2015] 7 CLJ 27 CA ***(refd)***

Malayan Banking Bhd v. Chairman Sarawak Housing Developers' Association [2014] 6 CLJ 409 FC ***(refd)***

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***

Mandalia v. Secretary of State [2015] UKSC 59 ***(refd)***

Mohamad Hassan Zakaria v. Universiti Teknologi Malaysia [2017] 10 CLJ 36 CA ***(refd)***

Nzolameso v. City of Westminster [2015] 2 All ER 942 ***(refd)***

Pembinaan Batu Jaya Sdn Bhd v. Pengarah Tanah dan Galian Selangor & Anor [2016] 5 CLJ 250 CA ***(refd)***

R v. Sevenoaks DC, ex p Terry [1985] 3 All ER 226 ***(refd)***

R v. St Edmundsbury Borough Council ex parte Investors in Industry Commercial Properties Ltd [1985] 3 All ER 234 ***(refd)***

R v. Westminster City Council ex p Ermakov [1996] 2 All ER 302 ***(refd)***

R (on the application of Governing Body of the London Oratory School) v. School Adjudicator [2015] All ER (D) 113 ***(refd)***

R (on the application of Hayes) v. Wychavon District Council [2014] EWHC 1987 ***(refd)***

R (on the application of Moseley) v. Haringey London Borough Council [2015] 1 All ER 495 ***(refd)***

R (on the application of Nadarajah) v. Secretary of State for the Home Department [2005] EWCA Civ 1363 ***(refd)***

Ramachandran Appalanaidu & Ors v. Dato Bandar Kuala Lumpur & Anor [2012] 1 LNS 625 CA ***(refd)***

Rohana Ariffin & Anor v. Universiti Sains Malaysia [1989] 1 MLJ 487 ***(refd)***

Save Britain's Heritage v. Secretary of State for the Environment & Others [1991] 2 All ER 10 ***(refd)***

Simpson v. Edinburgh Corporation 1960 SC 313 ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697 CA ***(refd)***

Steeples v. Derbyshire County Council [1984] 3 All ER 468 ***(refd)***

Tesco Stores Ltd v. Secretary of State for the Environment and Others [1995] 2 All ER 636 ***(refd)***

Tok Jwee Kee v. Tay Ah Hock & Sons Ltd & Town Council, Johore Bahru [1969] 1 LNS 193 FC ***(refd)***

YAM Tunku Dato Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor [2003] 1 CLJ 210 HC ***(refd)***

Zhang v. Canterbury City Council [2001] 51 NSWLR 589 ***(refd)***

Legislation referred to:

Building and Common Property (Maintenance and Management) Act 2007 (repealed), s. 8(2)(g)

Federal Territory (Planning) Act 1982, ss. 2, 10, 16(1), 21, 22(1), (4), (5), 26, 27, 28, 29

Planning (Development) Rules 1970, r. 5(3), (5), (6), (7), (8)

Rules of Court 2012, O. 15 r. 12, O. 53 rr. 1, 2(4)

Rules of the High Court 1980, O. 53

Strata Management Act 2013, ss. 2, 21(1)(i), 59(1), (2), 143(2)

Strata Titles Act 1985, ss. 4, 17B, 39(3)

Town and Country Planning Act 1976, s. 21(6)

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For the 2nd & 3rd respondents - Cecil Abraham, S Satharuban, Sunil Abraham, Noor Muzalifah & Ranjini Anndy; M/s Satha & Co

For the 4th respondent - Harpal Singh Grewal, Jayanthi Balaguru, Reny Rao & Ivanpal Singh Grewal; M/s JD Balaguru

[Editor's note: For the High Court judgment, please see Perbadanan Pengurusan Trellises & Ors v. Datuk Bandar Kuala Lumpur & Ors [2018] 1 LNS 2187 (overruled).]

Reported by Najib Tamby

JUDGMENT

Mary Lim JCA:

Introduction

[1] The principal issues in this appeal concern the question of *locus standi* to initiate judicial review proceedings against the local authority in matters concerning planning and development of an area falling within the purview of the local authority; and the ambit of challenge. The respective parties have made extensive oral and written submissions and the court records its appreciation for the assistance rendered.

The Application For Judicial Review

[2] The appellants' application for judicial review for the following orders was dismissed by the High Court:

(i) orders of *certiorari* to quash a conditional planning approval dated 28 February 2017 and a development order dated 13 July 2017 issued by the first respondent in relation to a proposed development of a piece of land known as HSD 119599, PT 9244, Mukim Kuala Lumpur, Bukit Kiara, Daerah Kuala Lumpur (the land);

(ii) an order of *mandamus* directing the first respondent to adopt the draft Kuala Lumpur Local Plan 2020 and to thereafter publish the adoption in the *Gazette* pursuant to s. 16 of the Federal Territory (Planning) Act 1982.

[3] These were the principal reasons for the High Court's decision:

(i) the appellants lack of *locus standi*;

(ii) the impugned decision was not tainted with any illegality, irrationality or procedural impropriety.

The Development Order

[4] These are the underlying facts as gathered from the numerous affidavits and counter-affidavits filed. The appellants' interests and complaints concern a development order dated 13 July 2017 granted by the first respondent, the Datuk Bandar. The area which forms the subject matter of the development order is said to involve a 'public park' known as 'Taman Rimba Kiara, Bukit Kiara Kuala Lumpur' (Taman Rimba Kiara), located within Taman Tun Dr Ismail (TTDI) and Bukit Kiara. The appellants claim that Taman Rimba Kiara comprises some 25.2 acres. The existence and size of this 'park' is contested by the Datuk Bandar, first respondent, in particular.

[5] Be that as it may, Taman Rimba Kiara did not start off as a park. It was initially part of a privately-owned rubber estate which was compulsorily acquired by the Federal Government in the 1970s. After the acquisition, it seems there was a master plan drawn up where the entire area would be turned into the Kuala Lumpur Botanical Gardens, National Arboretum and a Heroes' Mausoleum. Taman Rimba Kiara was designated to be a largescale nursery, supporting the botanical gardens and the arboretum.

[6] That plan did not proceed. Instead, three large pieces of the Bukit Kiara estate were retained as contiguous green spaces for public use namely, Taman Awam Bukit Kiara, Taman Lembah Kiara and Taman Rimba Kiara.

[7] Following the acquisition, the former workers of the Bukit Kiara rubber estate and their families were resettled into longhouses (Bukit Kiara Longhouses) located within the North-East corner of Taman Rimba Kiara. Some of these former workers were employed at the nursery within Taman

Rimba Kiara. At the time of resettlement in the 1980s, the 100 odd families of the Bukit Kiara Longhouses were promised long-term permanent housing by the Federal Government. The promise has yet to be fulfilled.

[8] Meanwhile, aside from being a nursery, the Taman Rimba Kiara was developed by the local authority of Kuala Lumpur as a public open space, green area and recreational area for the general public. Apparently, Taman Rimba Kiara is unique in that it is the only public park within the capital where wild hornbills are regularly sighted. It is also the habitat and/or migration point for various flora and fauna, many of which are said to be of protected species. The appellants describe it as functioning as "a green lung for the Kuala Lumpur and Selangor public (including the residents of TTDI) since the 1980s. Taman Rimba Kiara is unique within the Bukit Kiara Green Lung because of its combination of lush greenery and large open spaces that allow for large scale public activities".

[9] This use and existence of Taman Rimba Kiara as a public open space, public park and recreational area is said to be in accordance with the Kuala Lumpur Structure Plan 2020 (KL Structure Plan) and draft Kuala Lumpur Local Plan 2020 (KL Local Plan). In August 2014, this KL Structure Plan was adopted and gazetted by the first respondent, the Mayor or Datuk Bandar of Kuala Lumpur. Meanwhile, the KL Local Plan, presented to the public in 2008 remains un-gazetted till today.

[10] In early June 2016, the Datuk Bandar, the first respondent, as the planning authority in charge of control and regulation of proper planning in the city of Kuala Lumpur under the Federal Territory (Planning) Act 1982 (Act 267), erected a notice informing the public that it had received an application for planning permission to develop *inter alia* one block of affordable apartments (eight storeys) and eight blocks of luxurious service apartments (42-45 storeys) with eight storeys of podium carpark (the proposed development). The proposed development is to be constructed on a piece of land known as HSD 119599 PT 9244 Mukim Kuala Lumpur, Bukit Kiara, Daerah Kuala Lumpur (the subject land).

[11] This was the proposed development – pursuant to a joint-venture agreement dated 7 April 2014 entered between Yayasan Wilayah Persekutuan (Yayasan) and Memang Perkasa Sdn Bhd (Memang Perkasa) (JVA), the second and third respondents in this appeal, Memang Perkasa agreed to develop Yayasan's land known as HSD 119599, PT 9244, Mukim Kuala Lumpur, Bukit Kiara, Daerah Kuala Lumpur (the subject land) as a mixed development comprising:

1) 1 Blok Pangsapuri Mampu Milik 29 Tingkat (350 unit) Dengan 8 Tingkat Aras Podium Tempat Letak Kereta. 2) Menambahkan kepadatan Penduduk daripada 74 orang seekar kepada 929 Orang Seekar. 3) 8 Blok Pangsapuri Servis 42-54 Tingkat termasuk 8 Tingkat Podium Tempat Letak Kereta dan Kemudian dengan 5 Aras Besmen Tempat Letak Kereta. 4) Menukar Kegunaan Tanah daripada Kediaman Atas Lot PT 9244, Jalan Tun Mohd Fuad (bersebelahan Taman Awam Berskala Besar), Bukit Kiara Dalam Kawasan, Wilayah Persekutuan Kuala Lumpur atas sekeping tanah dikenali sebagai HSD 119599, PT 9244, Mukim Kuala Lumpur, Bukit Kiara, Daerah Kuala Lumpur.

Hereinafter referred to as "the said development".

[12] Under the JVA, Memang Perkasa is to pay Yayasan a sum of RM160 million as part of Yayasan's entitlement under the JVA. We understand Memang Perkasa has already paid Yayasan RM6 million of this RM160 million. The balance sum of Yayasan's entitlement is to be paid according to the schedule specified in cl. 4.2.5 of the JVA. Memang Perkasa also agreed to pay and has in fact already paid, a further sum of RM60,800,152 to the Director of the Land and Mines Office, Kuala Lumpur, being the premium sum for the alienation of the subject land to Yayasan.

[13] Although the subject land was yet to be alienated to Yayasan at the time of entry into the JVA, Yayasan agreed that vacant possession of the subject land would be delivered to Memang Perkasa upon execution of the JVA. Title to the subject land was issued on 11 August 2014.

[14] On 30 June 2015, Memang Perkasa submitted its first application for planning permission of the said development to the Datuk Bandar, the first respondent. In this first application, Memang Perkasa sought to increase the population density to 1,235 per acre and the plot ratio 1:10 for the commercial development aspect on the subject land for the proposed development (PD Plan 1).

[15] At a meeting held on 13 August 2015, Jawatankuasa Teknikal Pusat Setempat (JKTPS) of the first respondent decided that Memang Perkasa was to amend its proposal to comply with the following requirements:

i. density of affordable housing shall not exceed 1,200 per acre;

ii. plot ratio for commercial development shall not exceed 1:6;

iii. to provide at least 5% centralised open space which shall be surrendered for public use;

iv. each phase of development shall provide 10% centralised open space.

[16] On 16 October 2015, Memang Perkasa submitted an amended proposed development plan (PD Plan 2). In this PD Plan 2, Memang Perkasa appealed to increase the plot ratio of 1:6 to 1:10. It also asked for an exemption of the 5% centralised open space.

[17] At its meeting on 12 November 2015, JKTPS allowed PD Plan 2 in principle subject to the following amendments:

i. the site for affordable residential housing shall have a minimum area of 2.5 acres with a density of 1,200 per acre;

ii. the overall network of entrance and exit roads must be shown on the proposed plans and the proposed road in the area of the Taman Awam Berskala Besar is not allowed. Memang Perkasa was required to liaise with the Jabatan Pembangunan Infrastruktur to determine the width and alignment of the said road in further detail;

iii. plot ratio for commercial plot shall not exceed 1:6;

iv. to provide 5% of the overall proposed site as a centralised open space and which shall be surrendered for public use;

v. each proposed plot shall provide 10% centralised open space;

vi. to submit a comprehensive proposed plan including proposed service apartments (Plot B-E) in compliance with technical requirements and to be annexed with the proposed development at Plot A;

vii. to submit a new layout plan pursuant to the amendments made including the proposal for Plot F (Future Development);

viii. to submit a new perspective plan depicting the proposed development;

ix. to pay advertising costs for the process under rule 5 of the Planning (Development) Rules 1970.

[18] By letter dated 26 November 2015 sent to Jabatan Perancangan Bandaraya DBKL, Memang Perkasa appealed against the first four requirements as stated above.

[19] At a meeting held on 12 January 2016, JKTPS agreed to the size of the area and density of the proposed residential site at 1,200 per acre and a commercial development with a plot ratio of 1:10 but subject to feedback in the objection session pursuant to r. 5 of the Planning (Development) Rules 1970. Memang Perkasa was also required to comply with the following requirements:

i. to submit a new Traffic Impact Report ('TIA Report') based on the intensity at the plot ratio of 1:10 and to show clearly the proposed traffic dispersal from the proposed site as well as proposed upgrading of the existing infrastructure. Memang Perkasa is further required to submit a copy of the TIA Report to Jabatan Pembangunan lnfrastruktur for their comments;

ii. the entrance and exit roads using the Taman Awam Berskala Besar is not allowed. Memang Perkasa is required to show clearly the proposed entrance and exit roads from the main road to the proposed site;

iii. the requirement of the provision of 5% centralised open space in this development is exempted subject to Memang Perkasa surrendering the site reserved for the Hindu Temple.

[20] In May 2016, Memang Perkasa submitted the TIA report with the proposed entrance and exit roads *via* Jalan Damansara to Jalan Wan Kadir 5 and Jalan Tun Mohd Fuad.

[21] The notice issued by the Datuk Bandar that was mentioned at the outset of this narration was then issued. An advertisement in the local newspapers were carried from 14 June 2016 until 16 June 2016 inviting comments or objections on the proposed development. This was pursuant to r. 5(3) of the Planning (Development) Rules 1970.

[22] The appellants objected. In essence, their complaint is that the proposed development "will significantly increase the density of TTDI and irreversibly degrade Taman Rimba Kiara as a green lung"; that the proposed development on this 12-acre plot of land which is actually a part of Taman Rimba Kiara and which adjoins TTDI and the residential complexes of the first to fifth appellants, will increase the density of the area affected from 74 to 979 persons per acre.

[23] On 18 August 2016, Datuk Bandar issued to the first, second and sixth appellants a notice of a hearing scheduled for 29 August 2016. The hearing was pursuant to r. 5 of the Planning (Development) Rules 1970 (Planning Rules), made under the Federal Territory (Planning) Act 1982 (Act 267).

[24] At the hearing attended by representatives of the first, second and sixth appellants and other residents of TTDI, objections were raised against the proposed development. In substance, the objections were that:

(i) the proposed development is irrational, unreasonable and is not in accordance with applicable laws, rules and regulations;

(ii) the proposed development contravenes the provisions of the KL Structure Plan and KL Local Plan in terms of land usage, zoning and density;

(iii) the proposed development will cause the destruction of the green lung of Taman Rimba Kiara, irreversibly destroy its eco-system and its irreplaceable natural features aside from degrading its surrounding areas;

(iv) the proposed development will materially increase the congestion and pollution levels in TTDI and Taman Rimba Kiara thus reducing the attractiveness and value of the properties in TTDI;

(v) there is a conflict of interest as the senior officers of the then second respondent, the Dewan Bandaraya, also hold senior and/or management positions in Yayasan, the present owner of the subject land.

[25] At the hearing, the appellants discovered that the proposed development included a proposal and/or plan to construct a new flyover together with a six to eight-lane highway-cum-expanded road network in TTDI. This new highway was to create access for and support the increase in density caused by the proposed development. It seems this proposal for a new highway was not specified in the notice issued by the Datuk Bandar.

[26] Following the hearing, the first, second and sixth appellants wrote to the respondents reiterating their objections. There was no response until April the following year where by letters dated 3 April 2017 and 4 April 2017, the Datuk Bandar informed the first and second appellants that the proposed development was still at an evaluation stage and that they will be informed once a formal decision was made on the proposed development.

[27] On 10 May 2017, the Datuk Bandar issued a statement which was carried in the press wherein it was stated that the proposed development was still pending final approval; and that the Datuk Bandar will hold a meeting with the residents of TTDI and users of Taman Rimba Kiara in accordance with r. 5 of the Planning Rules. Through their solicitors, the appellants sought clarification on the status of the proposed development. There was no response to the solicitors' letters dated 1 June 2017, 11 July 2017 and 20 July 2017.

[28] On 28 July 2017, the appellants discovered Memang Perkasa carrying out survey works at Taman Rimba Kiara. Following a search with the Datuk Bandar's online portal, the appellants found that conditional planning approval for the proposed development had been granted. Through a written parliamentary reply dated 10 August 2017 issued by the then Minister of Federal Territories, the appellants learnt that the Datuk Bandar had granted a development order for the proposed development. All this was without notice to the appellants.

[29] From the affidavits filed and as outlined by the learned judge in his grounds of decision, Memang Perkasa's application for the proposed development was in fact still being processed by or under consideration of the Datuk Bandar. This is what had taken place during the intervening period.

[30] JKTPS in a meeting held on 11 October 2016 decided that Memang Perkasa was to comply with the following requirements:

i. the plot ratio for each plot and the entire service apartment development shall not exceed 1:10;

ii. reconfigure the proposed service apartments with a lower density and maximise environmental conversation to reduce the impact of the residents' objections;

iii. mark the site of the Hindu Temple for land surrender;

iv. each proposed plot shall make a provision of 10% centralised open space;

v. submit full particulars of the proposed service apartments;

vi. submit a new layout plan pursuant to the amendments submitted;

vii. submit a new perspective drawing to visualize the proposed development;

viii. submit a new TIA report clearly showing the proposed traffic dispersal from the proposed site and also proposed upgrading to existing infrastructure; a copy of the TIA Report was to be forwarded to Jabatan Pembangunan lnfrastruktur for their comments and also to Jabatan Perancangan Bandaraya;

ix. avoid an increase in traffic in existing residential areas in TTDI but the use of the entrance and exit roads *vide* Jalan Tun Mohd Fuad is allowed for the Temple plot and plot A only whereas the entrance and exit road for commercial development shall use the direct road from Jalan Damansara.

[31] Memang Perkasa then submitted a new TIA report dated November 2016 prepared by Perunding Trafik Klasik Sdn Bhd to Jabatan Perancangan Bandaraya. On 20 November 2016, through its town planner, SAM Planners, Memang Perkasa submitted its proposed residential development (affordable apartments) and commercial development to increase the density of the affordable housing to 976 per acre and plot ratio of the commercial development to 1:9.66.

[32] On 10 January 2017, JKTPS granted a conditional approval for the proposed development subject to Memang Perkasa complying with the following conditions:

i. mark the temple site for handover pursuant to the decision by JKTPS dated 12.1.2016 and 11.10.2016 as a condition for the exemption of 5% centralised open space;

ii. mark the surrender of a 100' road reserve as per the comments by the Jabatan Pembangunan lnfrastruktur dated 29.12.2016;

iii. provide 10% centralised open space at the functional ground level on Plot A;

iv. the open space for Plots B-D is over the basement and must have a minimum land depth of 1.6m for tree planting and a minimum cantilever height of 6m; Memang Perkasa must submit detailed landscaping for each proposed plot;

v. provide 100% motorcycle parking lot requirement at the plot of the proposed service apartments;

vi. provide a dedicated pedestrian land from Plot A to Taman Rimba Kiara;

vii. provide information on the status of ownership of the triangular land between the elevated pedestrian land and the junction into Taman Rimba Kiara from Jalan Wan Kadir 5;

viii. submit the comments from the Department of Irrigation and Drainage as the proposed new ramp encroaches on the Sungai Pencala reserve;

ix. liaise with the Infrastructure Development Department and the Landscape and Recreation Development Department on the proposed new ramp from Jalan Damansara to the proposed site which also involved the drainage and river reserve; and for such purpose, to submit to Jabatan Pembangunan Infrastruktur and Jabatan Perancangan Bandaraya a detailed plan for the proposed ramp. The proposed road circulation must take into account:

a. ingress and egress from Jalan Wan Kadir 1 to the proposed site is not allowed but vehicle access to Taman Rimba Kiara from Jalan Wan Kadir 1 must be provided;

b. review the possibility of providing vehicular access to Taman Rimba Kiara from the existing roundabout at Jalan Wan Kadir 3;

c. layout of the car park under the plan in the area of Taman Rimba Kiara must be reviewed to ensure an exit road to the park is provided;

d. the proposed ramp shall be built by Memang Perkasa who shall solely bear the costs;

e. the proposed car park under the ramp in the area of Taman Rimba Kiara shall be handed over to DBKL after construction is completed for public use.

[33] Once again, Memang Perkasa amended its plans and re-submitted them *vide* letter dated 15 February 2017. On 28 February 2017, JKTPS decided to postpone its decision on Memang Perkasa's application pending compliance of the following:

i. submit the comments by the Irrigation and Drainage Department as the new proposed ramp encroaches onto the Sungai Penchala reserve;

ii. the cul-de-sac road in the proposed site must be marked as a road reserve.

[34] On 21 March 2017, JKTPS approved the proposed residential development (affordable apartments) and commercial development subject to the following:

i. the cul-de-sac road in the proposed site must be marked as a road reserve;

ii. Memang Perkasa is to pay the development charges as determined by JPPH for the increase in land value for change in land use from residential to commercial and for increase in population density from 60 persons per acre to 976 persons per acre;

iii. pay the increase in ISF contribution and deposit.

[35] At the same time, JKTPS referred Memang Perkasa's latest application to various external technical departments and agencies for their comments.

[36] On 30 March 2017, JKTPS granted a conditional approval for the proposed development subject to Memang Perkasa complying with the specific requirements of Tenaga Nasional Berhad (TNB) and SW Corporation concerning electricity supply and waste management. For this purpose, Memang Perkasa was to liaise with TNB and SW Corporation in order to determine the location and detailed specifications required by TNB and SW Corporation and to submit various plans and markings in the proposed plans for these requirements to TNB and SW Corporation.

[37] In addition, Memang Perkasa was required to:

i. mark the cul-de-sac in the proposed site as road reserve;

ii. pay the development charges, as determined by JPPH, for the increase in land value for the change in land use from residential to commercial and for the increase in population density from 60 persons per acre to 976 persons per acre;

iii. pay the increase in ISF contribution and deposit.

[38] On 13 July 2017, upon compliance of the above, a development order was issued for the proposed development on the subject land.

[39] On 11 August 2017, the appellants filed a judicial review application seeking the orders mentioned earlier and for which leave was granted on 23 August 2017. It must be mentioned that the appellants first cited Dewan Bandaraya Kuala Lumpur as the second respondent before proceedings were

then discontinued against this respondent. Yayasan, Memang Perkasa and Pertubuhan Penduduk Perumahan Awam Bukit Kiara, Dewan Bandaraya, Taman Tun Dr Ismail, Kuala Lumpur (PPPA) were also allowed to intervene by order of court dated 15 November 2017. PPPA is a society registered under the Societies Act 1966. It represents the residents of the Bukit Kiara Longhouses. According to PPPA, all families of the Bukit Kiara Longhouses signed an agreement with Yayasan known as the "Master Resettlement Agreement" dated 16 December 2015 where they would acquire affordable housing without any financing.

[40] In the application (which was later amended), as summarised by the learned judge, the appellants contended that the two impugned decisions dated 28 February 2017 and 13 July 2017 ought to be quashed for the following broad reasons:

(i) the decisions are tainted with illegality, irrationality and procedural impropriety;

(ii) the appellants have a legitimate expectation that the subject land will remain as a public open space, recreational and sports area, green area and city park.

[41] All the respondents objected to the application for judicial review. On 14 December 2017, the High Court dismissed the appellants' application to stay Memang Perkasa's development at the site of the subject land.

Decision Of The High Court

[42] On 28 November 2018, the High Court dismissed the appellants' application. As pointed out at the start of these deliberations, the dismissal rested on two grounds – lack of *locus standi* and that the impugned decision was valid.

[43] The matter of *locus standi* was taken up as a preliminary issue together with the issue of the existence of the two impugned decisions – the conditional planning approval dated 28 February 2017 and the development order dated 13 July 2017.

[44] On the issue of *locus standi*, the respondents had submitted that for the appellants to be entitled to mount a challenge, r. 5(3) of the Planning Rules required them to show that they are the registered owners of lands adjoining to the subject land. His Lordship agreed after "having perused the affidavit evidence and all the relevant documents exhibited in the application" and finding that "there is nothing to show that the third to tenth applicants are the registered owner of the lands adjoining to the subject land".

[45] In respect of the first to the fourth appellants which are management corporations established under s. 39 of the Strata Titles Act 1985 with duties as specified under ss. 59(1) and (2) of the Strata Management Act 2013 (Act 757), the respondents contended that these appellants had no power to file the judicial review application. The same goes for the fifth appellant who is a joint management body established under Act 757. It was argued that these bodies only had duties and powers confined to the common property located within the respective properties. In this regard, the learned judge also agreed with the respondents after perusing the relevant laws, that their "duties and powers are only in relation to the common property"; citing this court's decision in *Amber Court Management Corporation & Ors v. Hong Gan Gui & Anor* [2016] 2 CLJ 751; [2016] 2 MLJ 85 (*Amber Court*). His Lordship was of the view that on this ground alone it would have been sufficient to dismiss the application for judicial review.

[46] On the second preliminary issue, the argument as we understand it, was that there was no conditional planning approval dated 28 February 2017. What happened was that on 28 February 2017, JKTPS decided to postpone the consideration of Memang Perkasa's application for planning permission and had instructed Memang Perkasa to comply with certain conditions, the details of which were alluded to earlier. The conditional planning approval was actually granted on 30 March 2017. Consequently, His Lordship held that the only decision to be considered by the court was the decision of 13 July 2017 where the Datuk Bandar granted the development order for the proposed development on the subject land.

[47] As to the merits of the application, the learned judge found that since the appellants did not have the requisite *locus standi*, the provisions of the Planning Rules requiring the affected persons to be informed of the decision of the Commissioner, was inapplicable. In any case, the first, second and sixth appellants had been informed of the decision to grant the development order *vide* letter dated 20 July 2017. The learned judge further found that since judicial review "pertains to the decision-making process as well as its legality, rationality and reasonableness in arriving at the said decision", r. 5(8) of the Planning Rules did not apply as it relates to an act after the decision had been made.

[48] On the duty to give reasons, the learned judge found that both the Federal Territory (Planning) Act 1982 (Act 267) and the Planning Rules do not impose any statutory duty to give reasons. The only occasion would be under s. 22(5) of Act 267 where the planning permission is granted with conditions or, if it was refused. Since that was not the case here and since reasons had been given, the complaint was found to be without merit.

[49] The learned judge also rejected the appellants' contention that the Datuk Bandar's decision contravenes s. 22(1) of Act 267 when it failed to consider the Kuala Lumpur Structure Plan and the Kuala Lumpur Local Plans. Under the earlier, the subject land has been demarcated as a public open space, recreational and sports area, green area and city park while under the latter plan, Taman Rimba Kiara has been demarcated as a city park and public open space with zero development intensity.

[50] His Lordship also did not find s. 22(1) read together with s. 22(4) of Act 267 infringed. In His Lordship's view, having perused the facts in totality and the steps taken before the planning permission was granted, the Datuk Bandar had "considered all pertinent matters including the KL Structure Plan and adhere to it as practicable as can be for the proposed development"; that the words "to have regard to" in s. 22(1) did not mean "to adhere strictly or slavishly", as interpreted by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1; that the KL Structure Plan contains "general policies to guide the development of Kuala Lumpur" but it does not contain "any detailed physical planning for specific area and more importantly this instrument is not binding and subject to changes when the need arises".

[51] As for the draft Local Plan, it had not come into effect as it was yet to be finalised or adopted under s. 16(1) of Act 267. The issue of its non-compliance thus did not arise. His Lordship added that the Datuk Bandar had to "balance the adherence to the KL Structure Plan and the welfare of the original settlers of Bukit Kiara Longhouses Community which has stayed there for 35 years and have been waiting for a new house in this proposed development".

[52] On the question of conflict of interest, the appellants had contended that there exists a conflict of interest because the Datuk Bandar is a member of the Board of Trustees of Yayasan and the application for planning permission was made in the joint names of Yayasan and Memang Perkasa. The application was actually made by Memang Perkasa under a power of attorney granted by Yayasan.

[53] This argument was also rejected by the learned judge on the basis that whilst the Datuk Bandar is one of eight members of the Board of Trustees of Yayasan, the development order was not signed by Tan Sri Haji Mohd Amin Nordin bin Abdul Aziz, the Datuk Bandar. He also did not sit in any of the meetings in relation to the application; neither was he involved in the decision-making process to approve the application. The learned judge found "more importantly here, the issuance of the development order was in accordance with the procedures and requirements under the FTA 1982 and the Planning (Development) Rules 1970".

[54] Finally, on the question of legitimate expectation, the learned judge found that it was "only a mere expectation not recognised by law and as such is not a legitimate expectation".

Our Decision

[55] The same issues were canvassed before us with the respondents urging this court to dismiss the appeal on the ground that the threshold for appellate intervention had not been fulfilled. Although separately represented, the submissions of the respondents were substantially similar so we will only make particular mention of the respondent concerned where the need arises.

Locus Standi

[56] The ten appellants before us whose *locus standi* is questioned are:

i. 1st appellant – Management Corporation of Trellis Apartments

ii. 2nd appellant – Management Corporation of Kiara Green Townhouses

iii. 3rd appellant – Management Corporation of Residence Condominium

iv. 4th appellant – Management Corporation of TTDI Plaza Condominium

v. 5th appellant – Joint Management Corporation of The Greens Condominium

vi. 6th appellant – public officer of Residents' Association of TTDI

vii. 7th to 10th Appellants – individual property owners/residents in TTDI

[57] Two reasons were proffered to and accepted by the learned judge for the lack of *locus standi* – r. 5(3) of the Planning Rules, and the status of the appellants as statutorily established bodies.

[58] It was suggested to us that even though the appellants may have obtained leave under O. 53 r. 1 of the Rules of Court 2012 to proceed with the judicial review application thereby securing threshold *locus standi*, the appellants nevertheless lack substantive *locus standi* which is granted by virtue of r. 5(3) of the Planning Rules.

[59] The respondents (in particular Yayasan and Memang Perkasa, the second and third respondents who were represented by the same set of solicitors) argued that since the amended judicial review application was premised on amongst others, ss. 16, 21 and 22 of Act 267, r. 5 of the

Planning Rules, the appellants must be in the position to demonstrate that the threshold and/or requirements under those laws have been met insofar as the application for judicial review is concerned; and that despite the numerous affidavits filed, it was further submitted that the appellants have failed to establish their case. Section 16 deals with adoption of the draft local plan whilst ss. 21 and 22 deal with applications for planning permission and the grant of development orders. We will deal with s. 16 when discussing the position of the structure plan and the local plan. As for ss. 21 and 22, the arguments of the respondents are really about r. 5, and the right of the appellants to object and to present the application for judicial review.

[60] Rule 5(3) reads as follows:

> **5. Planning permission in respect of a development which involves increase in residential density of change of use of land.**
>
> (1) …
>
> (2) …
>
> (3) If the Commissioner is of the opinion that the proposed development is proper and may, subject to further inquiry be considered, he shall, by way of advertisement in four local papers, which shall be in the national language, English language, Chinese language and Tamil language, give notice of the proposed development and of the right to make objections by any person claiming to be:
>
> (a) the registered owners of lands adjoining the land to which the application relates;
>
> (b) the registered owners of lands separated by any road, lane, drain or reserved land the width of which does not exceed twenty metres and whose lands would be adjoining the land to which the application relates had the lands not been separated by such road, lane, drain or reserved land; and
>
> (c) the registered owners of lands located within the distance of two hundred metres from the boundary of the land to which the application relates if, the access road to the land to which the application relates is a cul-de-sac and the registered owners of land use the same cul-de-sac.

[61] Rule 5(3) recognises only a certain category of persons who have a right to object to any proposed development on or to any adjoining land. In such event, this category of persons have a right to be notified of the impending or proposed development and also a right to attend a hearing and voice their objections or concerns – see r. 5(5) and (6).

[62] The respondents claim that they have challenged the appellants to prove their status and since the appellants have not offered evidence of themselves as registered landowners of land adjoining the subject land or more precisely PT 9244, they lack substantive *locus standi* under the provisions cited above. The argument further is that the right to object or challenge the decisions made by the Datuk Bandar, the local authority charged with the responsibility of granting planning permission under Act 267, is a statutory right and not an automatic legal right. The decisions in *Buxton And Others v. Minister of Housing and Local Government* [1960] 3 All ER 408, *Gregory and Other v. London Borough of Camden* [1966] 2 All ER 196, *Simpson v. Edinburgh Corporation* 1960 SC 313, *District Council Central, Province Wellesley v. Yegappan* [1966] 1 LNS 46; [1966] 2 MLJ 177; and the Court of Appeal decision in *Ramachandran Appalanaidu & Ors v. Dato' Bandar Kuala Lumpur & Anor* [2012] 1 LNS 625; [2012] 6 MLJ 519, were then cited in support.

[63] On the second aspect of the objection, the respondents contended that the Court of Appeal decision in *Amber Court* is authority for the proposition that the powers and duties of the first five appellants are as stated in ss. 21, 59(1) and (2) of Act 757; and that as management corporations or joint management bodies, these appellants can take legal proceedings only in respect of cases involving common property. This is espoused in s. 143(2) of Act 757:

> (2) Where all or some of the parcel owners or proprietors of the parcels in a development area:
>
> (a) are jointly entitled to take proceedings for or with respect to the common property in that development area against any person or are liable to have such proceedings taken against them jointly;
>
> (b) are jointly entitled to take proceedings for or with respect to any limited common property in that development area against any person or are liable to have such proceedings taken against them jointly,
>
> the proceedings may be taken:
>
> (A) in the case of paragraph 2(a), by or against the joint management body or management corporation; or
>
> (B) in the case of paragraph (2)(b), the subsidiary management corporation constituted for that limited common property,
>
> as if the joint management body, management corporation or subsidiary management corporation, as the case may be, were the parcel owners or the proprietors of the parcels concerned.

[64] It was further contended that Taman Rimba Kiara and the proposed development is not within the understanding and construct of the term "common property". Consequently, the appellants have no *locus standi*.

[65] In our view, this objection on lack of *locus standi* is without merit. The application before us is an application for judicial review wherein the provisions of O. 53 of the Rules of Court 2012 apply. The Rules of Court 2012 are made pursuant to the Courts of Judicature Act 1964 (Act 91) which expressly provide for the supervisory jurisdiction of the court to judicially review decisions of inferior or subordinate bodies and the Executive such as the first respondent, the Datuk Bandar.

[66] Order 53 r. 2(4) expressly allows persons who are "adversely affected" by the decision made by a public authority to initiate judicial review applications:

> Any person who is **adversely affected** by the decision of any public authority shall be entitled to make the application.
>
> (emphasis added)

[67] It is not in dispute that the impugned decision is made by the first respondent, the Datuk Bandar who is a public authority. What is in dispute is the appellants' right to challenge that impugned decision, that O. 53 r. 2(4) merely provides for a threshold *locus standi* and that the appellants must further establish substantive *locus standi*; and substantive *locus standi* is as provided under r. 5(3) of the Planning Rules.

[68] In our view, this line of submission is without merit. Order 53 r. 2(4) does not make any distinction between threshold and substantive *locus standi.* Order 53 is the written manifestation of the court's power on supervisory jurisdiction through judicial review and as to how that jurisdiction may be engaged. Consequently, we should not read into O. 53, any requirements which are simply not there. The approach of requiring two thresholds of *locus standi* as expressed in *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors And Other Appeals* [1997] 4 CLJ 253; [1997] 3 MLJ 23 (*Kajing Tubek*) has since been rejected and was in any case, the position under the old O. 53 of the Rules of the High Court 1980.

[69] This was made clear by the Federal Court in *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145 (*Malayan Trade Union*). In our view, this decision has put to rest the argument that there must be established both threshold and substantive *locus standi.* The Federal Court examined the decision in *Kajing Tubek* which had made that proposition and where at pp. 276-277 (CLJ); pp. 40-41 (MLJ), the Court of Appeal opined as follows:

> In public law – and, in so far at least as the appellants in the first and second appeal are concerned, the summons in the present instance lies in public law – there are two kinds of *locus standi*. The first is the initial or threshold *locus standi*: the second is the substantive *locus standi.* Threshold *locus standi* refers to the right of a litigant to approach the court in relation

to the facts which form the substratum of his complaint. It is usually tested upon an application by the defendant to have the action struck out on the ground that the plaintiff, even if all that he alleges is true, cannot seek redress in the courts. Although a litigant may have threshold *locus standi* in the sense discussed, he may, for substantive reasons, be disentitled to declaratory relief. This, then, is substantive *locus standi*. The factors that go to a denial of substantive *locus standi* are so numerous and wide ranging that it is inappropriate to attempt an effectual summary of them. Suffice to say that they range from the nature of the subject matter in respect of which curial intervention is sought to those settled principles on the basis of which a court refuse declaratory or injunctive relief.

[70] The Federal Court cautioned that there had been amendments to the Rules of Court 2012 in respect of judicial review applications and a change in approach on this issue was called for:

[46] It is also important to note that the framework for judicial review was changed by the amendments to O. 53 of the RHC in 2000. Order 53 r. 1 and 2 provide:

1. This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified. This Order is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950.

2(1) An application for any of the reliefs specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of *habeas corpus*) shall be in Form IIIA.

(2) …

(3) …

(4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[47] With regard to the new O. 53 the Court of Appeal made the following observation in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413 at p. 420; [2002] 2 CLJ 697 at pp 705-706:

… It must not be forgotten that O. 53 in its present form was introduced to cure the mischief of its precursor, which was much narrower and more restrictive. Two points may be noted when considering our present O. 53. First, that it begins by referring to the powerful and enabling provision introduced for the first time in our law by Parliament in para 1 of the Schedule to the Courts of Judicature Act 1964 …

To return to the construction to be given to O. 53, I turn to the second point I wish to make. It is the principle which governs the construction of rules of courts. A rule of court should not be interpreted in such a way as to result in unfairness or produce a

manifest injustice: *Bank of America National Trust And Savings Association v. Chai Yen* [1980] 1 MLJ 198; *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292; [1995] 1 CLJ 491. So here, a manifest injustice would occur if O. 53 is read restrictively so as to permit an applicant to claim a declaration only where he applies for it jointly with some other remedy. I might add that under para 1 of the Schedule to the Courts of Judicature Act 1964, which is drawn from art 226 of the Indian Constitution and to which in material parts it is identical, our courts have power to issue such orders and grant such relief as is appropriate to the particular circumstances of a given case …

[48] In *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* at pp. 541–542 the Court of Appeal said:

[16] It is to rid this dichotomous approach which often produced injustice that O. 53 in its present form was introduced. *There is a single test of threshold locus standi for all the remedies that are available under the order. It is that the applicant should be 'adversely affected'. The phrase calls for a flexible approach.* It is for the applicant to show that he falls within the factual spectrum that is covered by the words 'adversely affected'. At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action impugned. See, *Finlay v. Canada* (1986) 33 DLR 421. This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense (see *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771) has been or is being or is about to be infringed. In all such cases, the court must, *ex debito justitiae*, grant the applicant threshold standing. See, for example, *Thorson v. Attorney General of Canada* [1975] 1 SCR 138.

[17] At the other end of the spectrum are cases where the *nexus* between the applicant and the legality of the action under challenge is so tenuous that the court may be entitled to disregard it as *de minimis*. In the middle of the spectrum are cases which are in the nature of a public interest litigation. The test for determining whether an application is a public interest litigation is that laid down by the Supreme Court of India in *Malik Brothers v. Narendra Dadhich* AIR 1999 SC 3211, where, when granting leave, it was said: *Public interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual.* But if the Court finds that in the garb of

> a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated.
>
> (emphasis added)

[71] Thereafter, the Federal Court proceeded to prefer the view and approach taken in *QSR Brands Bhd v. Suruhanjava Sekuriti & Anor* (*supra*), holding that the earlier test laid down by the Supreme Court in *Government Of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12 was actually not propounded in a case for judicial review proceedings, but in private law.

> [53] It is to be noted that the test in *Lim Kim Siang*'s case was not propounded in respect of judicial review proceedings. The claim brought by Mr Lim Kit Siang was in private law. Hence the *Boyce* test, as opined by the majority in the *National Federation*, is not applicable to such proceedings.
>
> [54] The courts, both local and foreign, have recognised the need for the law to remain relevant to achieve the objective of the law. The English courts, over the years, had adopted a more liberal approach especially in matters of public interest (see *De Smith's Judicial Review* (6th Ed), para 2-031: *R v. Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386; *R v. Inspectorate of Pollution ex p Greenpeace No 2* [1994] 4 All ER 329).
>
> [55] In *Onus v. Alcoa of Australia Ltd* (1981) 149 CLR 27, Stephen J made the following observation with regard to the test for standing for federal purposes in Australia: … The criterion of 'special interest' supplies no such rule. As the law now stands it seems rather to involve in each case a curial assessment of the importance of the concern which a plaintiff has with a particular subject matter and of the closeness of that plaintiff's relationship to that subject matter.
>
> [56] In India, the Indian judicial approach on standing has 'veered towards liberalisation of the *locus standi* as the courts realise that taking a restrictive view on this question will have many grievances unremedied' (see *Principles of Administrative Law*, MP Jain & S N Jain, (6th Ed) at p 1994).
>
> [57] In view of the foregoing we are of the view that the view expressed by the Court of Appeal in *QSR Brands Bhd v. Suruhaniava Sekuriti & Anor* that the 'adversely affected' test was a single test for all the remedies provided for under O. 53 of the RHC is to be preferred.

[72] However, the Federal Court in *Malayan Trade Union* was not prepared to find that the test for *locus standi* was met if the applicant could show 'sufficient interest', taking the position that "… for an applicant to pass the 'adversely affected' test, the applicant has to at least show he has a real and genuine interest in the subject matter. It is not necessary for the applicant to

establish infringement of a private right or the suffering of special damage". This decision sets the test for all judicial review applications regardless of the subject matter so long as the decision may be ascribed to a public authority. It would be wrong to attempt to artificially distinguish it as only binding for judicial review in trade union cases.

[73] In this instant appeal, r. 5(3) is relevant to the question of *locus standi* at hearings or inquiries conducted by the Commissioner under the Planning Rules. Rule 5(3) provides for registered owners of the lands adjoining the land to which the application relates to be notified and to be heard at the time the planning permission is under consideration. For the purposes of service of notice and the right to be heard, only those persons who fall within the terms of r. 5(3) are to be notified of any proposed development and of their right to object to the proposed development.

[74] In our view, the requirements of r. 5(3) have already or ought to have been attended to at the hearing of 29 August 2016 because it is at that hearing that the Commissioner will or should decide whether the objectors are the proper persons under r. 5(3) to attend and place their objections to the proposed development. Rule 5(3) is not relevant for the purposes of determining *locus standi* in relation to the application for judicial review; and we agree with the appellants that the respondents must not conflate the two separate *locus standi* requirements.

[75] Order 53 r. 2(4) further does not require such persons to further establish their right under specific law before they are entitled to initiate judicial review proceedings. There is only one single test, that is, whether the appellants are adversely affected by the impugned decision. This is apparent from the decision where the Federal Court in *Malayan Trade Union* expressly approved the wider and more flexible approach that was adopted in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697; [2002] 2 MLJ 413, agreeing with the Court of Appeal that the previous position was too narrow and restrictive and that the amendments to O. 53 r. 2(4) (as it stands today) was to cure that mischief of its "precursor" which had resulted in unfairness and injustice. As judicial review proceedings are brought in the area of public law, to attend to grievances of abuses or complaints of wrongs by public authorities including the Datuk Bandar, in order to offer redress of public injury, Rules of Court must be read more liberally and with greater flexibility. We have no intention of reading otherwise and regressing with this appeal. We must not attempt to reset that bar or test for judicial review which unfortunately the learned judge unwittingly, did.

[76] We are further convinced that the appellants have the requisite *locus standi* to initiate these judicial review proceedings. As a society registered under the Societies Act 1966 (Act 335) and representing the residents of TTDI, the sixth appellant undoubtedly has the necessary capacity and competency to bring legal proceedings; and more importantly, it has the requisite *locus standi* to bring the judicial review application.

[77] Having regard to the underlying facts, we are also in no doubt that all the appellants before us have real and genuine interests in the subject matter of the judicial review, and that is, the effect the impugned decisions have on them. In our view, the appellants have amply shown that they are adversely affected by the impugned decision in that they are residents, owners and/or occupiers of the properties located within the immediate vicinity of the proposed development, and are users of Taman Rimba Kiara, where the subject land is located. It is undeniable that the proposed development will, both directly and indirectly impact the appellants in the multifarious ways described by them in the affidavits filed; from the use of their properties, value of such properties, to the traffic or egress and ingress in relation to their properties; and the simple matter of use of Taman Rimba Kiara; more so given the magnitude of the proposed development that impacts directly on the density of population in their area. All these effects are unquestionably irreversible, permanent and far-reaching.

[78] Even if for a moment, any of the appellants before us did not qualify to be notified of the proposed development under the terms of r. 5(3), we are of the opinion that these appellants nevertheless have a right to bring the judicial review application. The first respondent, Datuk Bandar, as a local authority owes a duty "at common law to notify and hear objections from adjoining landowners in order to be regarded as having acted fairly in making its decision." This was expressed by Mahadev Shanker J (as His Lordship then was) in *Lee Freddie & Ors v. Majlis Perbandaran Petaling Jaya & Anor* [1994] 1 LNS 212; [1994] 3 MLJ 640 where His Lordship opined that the practice of notifying adjoining landowners as set out in s. 21(6) of the Town and Country Planning Act 1976 giving affected persons the right to object to local plans and development plans "were merely declaratory of what good administration practice is".

[79] We agree with that view and hold that it applies equally in the context of Act 267, an Act "to make provisions for the control and regulating of proper planning in the Federal Territory, for the levying of development charges, and for purposes connected therewith or ancillary thereto". There can only be proper and effective planning in the area of the local authority if the owners or residents of properties in the vicinity of the proposed development are consulted or heard before such application for planning permission is decided one way or another. Where these persons have been kept in the dark, it cannot be denied that they have been adversely affected.

[80] As for the issue of having only limited powers to take legal proceedings by reason of what the first six appellants are, with respect, we also do not agree. Section 39(3) of the Strata Titles Act 1985 (Act 318) expressly cloaks the first five appellants with the legal capacity to sue and we note that these appellants have narrated that their action is representative for the proprietors of the respective properties for which they are the management corporations or joint management corporation, as the case may be. This representative action is permissible under the Rules of Court 2012 (see O. 15 r. 12); otherwise all the owners of the units would have to be named as applicants.

[81] It is clear from the cause papers that the first to the fifth appellants, and even in the case of the sixth appellant, have initiated the judicial review proceedings in the character and capacity of a representation action. These appellants were and are not seeking to enforce some 'personal' right of action. All these appellants and the persons they represent have a common interest and grievance and they seek the same reliefs in which case the conditions under O. 15 r. 12 of the Rules of Court 2012 are met. See the Federal Court decision in *Malayan Banking Berhad v. Chairman Sarawak Housing Developers' Association* [2014] 6 CLJ 409; [2014] 5 MLJ 169 where it was held that O. 15 r. 12 should be seen as a "flexible tool of convenience in the administration of justice and not to be applied in a rigorous sense". Order 15 r. 12 is "designed to avoid multiplicity of proceedings"; and we find that judicial review proceedings are not excluded from its application. On the contrary, it can only be of practical benefit to have recourse to O. 15 r. 12 in such circumstances.

[82] We are further of the view that the decision in *Amber Court* is of no application to the particular facts in this appeal. The management corporation in *Amber Court* was seeking damages in relation to a defamation action and it was in this respect that the Court of Appeal held that the management corporation lacked the requisite *locus standi*, that since the allegation was that the management corporation had been personally defamed, the action should then have been initiated in the personal capacities of the individual members of the management corporation.

[83] In any case, the nature of the complaints in the judicial review proceedings relates to matters which the first six appellants have the authority and mandate to take up. All that is required is the competency to initiate legal proceedings which, as alluded to earlier, is fulfilled. Like the circumstances in *Badan Pengurusan Tiara Duta v. Timeout Resources Sdn Bhd* [2014] 8 CLJ 133; [2015] 1 MLJ 110, the absence of a specific provision in Act 757 or 318 does not necessarily mean that these appellants lack the power to bring the application for judicial review.

[84] As expressed in *Badan Pengurusan Tiara Duta*, the general provision in s. 8(2)(g) of the Building and Common Property (Maintenance and Management) Act 2007 (Act 663) providing for the management corporations or the joint management bodies "to do all things reasonably necessary for the performance of its duties under the Act" is, in our regard, extensive enough to allow these appellants that mandate and power. The equipollent provision is reflected in s. 21(1)(i) of Act 757 read with s. 143 of the same.

[85] We add that we are also persuaded by the appellants' argument that aside from their powers and duties under s. 59 of Act 757, by virtue of the first five appellants being proprietors of the common property (as defined under s. 4 of Act 318 and s. 2 of Act 757) in their respective properties (s. 17B of Act 318), these appellants have interests which are adversely affected by the proposed planning application and for which these appellants may initiate the judicial review proceedings under s. 143 of Act 757. It is not unreasonable to envisage the common areas being affected by the construction of the proposed development due to vibration, debris, pollution as claimed by these appellants.

[86] We note that the first, second and sixth appellants were served notices to attend the hearing on 29 August 2016 under r. 5(3). The Datuk Bandar treated and accepted them as objectors, and their presence was not objected to at the hearing.

[87] We agree with the appellants that the Datuk Bandar cannot now approbate and reprobate. In this regard and following the decision in *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor* [2003] 1 CLJ 210; [2003] 5 MLJ 128, the issuance of the notice under r. 5(3) is sufficient evidence of *locus standi* in respect of the application for judicial review; that these appellants are not mere busybodies but have very real and genuine interests in the proposed development which they say will adversely affect their lives and properties.

[88] Aside from these appellants, there were many others including the remaining appellants who attended and participated at the hearing without incident. Thus, it would be unjust to now allow the Datuk Bandar's objection that these appellants lack *locus standi.*

[89] The calling of the hearing and the attendance of the appellants at the hearings have real implications in that amongst others, the appellants were under the impression and in fact, are under r. 5(8) of the Planning Rules, entitled to expect to be informed in writing of the outcome of the hearing, and of the Commissioner (Datuk Bandar)'s decision in relation to the application for planning permission which they had all objected to and/or

expressed concerns. We will return to this issue later when dealing with the merits but suffice for the purpose of this issue of *locus standi*, that the respondents' objection is bad in law and on the facts, and is thus over-ruled.

[90] We thus agree with the appellants that the learned judge had failed to apply the correct test, that is, the 'adversely affected' test in O. 53 r. 2(4) of the Rules of Court 2012 and had thereby erroneously applied the law relating to *locus standi.* We add that we did not find anywhere in the judgment a record of the learned judge dealing with O. 53 r. 2(4) and the Federal Court decision in *Malayan Trade Union.*

[91] Even if the first six appellants lack *locus standi* for the reasons relied on by the respondents, we cannot see how the same may be raised against the individual appellants who are residents in the immediate vicinity of the proposed development and/or are users of the Taman Rimba Kiara. We have no hesitation in finding that their interests are real and genuine and are indeed adversely affected by the proposed development on the subject land. The learned judge ought to have treated, at the very least, these appellants separately.

[92] As we see it, none of the appellants may be said to be persons with no interest in the impugned decision. The development order concerns the development of a very substantial area in the immediate vicinity and neighbourhood of these appellants who not only use Taman Rimba Kiara but who live in TTDI, where the subject land is. It is a development, purportedly to resolve the housing of the 100 families of the Bukit Kiara Longhouses. But, it is clearly more than that. It is a commercial joint-venture between two entities. The size and magnitude of the development sees traffic impact studies and the construction of additional or new elevated highways clearly shows that the planning permission that was sought in this case, is not over a relatively minor development.

[93] Unquestionably, the development impacts and affects the whole neighbourhood and immediate vicinity of the subject land. Undeniably too, the appellants are one of the neighbours who are adversely affected by how their new neighbour, Yayasan and Memang Perkasa are planning to develop their subject land. And, this is precisely why there are planning laws in the first place.

[94] We are thus amply convinced that the learned judge erred in concluding that the appellants lack *locus standi.* For the multitude of reasons explained, we find that the appellants are fully cloaked with the requisite *locus standi* and they stand entitled to challenge the development order.

[95] A final point in this regard is the matter of the development order being granted in respect of private titled land; that in such circumstances, Yayasan and Memang Perkasa are entitled to develop the subject matter in the manner as they see fit; more so when the development is not prohibited by the category of land use as appearing in the title.

[96] The circumstances on how the subject land came to pass into the hands of Yayasan; the JVA and its terms, and how the subject land and its development is treated under the Comprehensive Development Plan [CDP] which is to be found in plans nos.: 1039, 1040 and 1041 in the "City of Kuala Lumpur (Planning) Act 1973 (Act 107), the KL Structure Plan and any local plan, are also not matters in any serious contention.

[97] This is because, it is beyond dispute that the subject land was originally State land. It was not private land bought and sold between two entities. The subject land was alienated and title in the name of Yayasan was issued. The JVA clearly discloses that Memang Perkasa paid the premium of RM60,800,152 for its alienation. It is also beyond dispute that the subject land of just over 12 acres is carved out of a larger area where the Taman Rimba Kiara is located, leaving around 13 acres for 'future development'.

[98] We remind ourselves that Yayasan, Memang Perkasa and the fourth respondent chose to intervene in the judicial proceedings; they were not cited by the appellants. In our view, the issue of ownership of land and the use of the land as governed by the National Land Code actually does not alter the views expressed. This is because it is the development order issued by the first respondent, Datuk Bandar that is under scrutiny of the court through the powers of judicial review; whether the Datuk Bandar has complied with the relevant laws and procedure; and whether such decision is tainted with impropriety, illegality, unreasonableness, irrationality for the reasons complained of by the appellants; not the validity of the alienation or even the JVA. The status of the land does not *ipso facto* remove the impugned decision from the court's scrutiny. Neither does it mean that the development order thus cannot be challenged.

Merits Of The Application

[99] Moving next to the substantive complaints of the appellants which were all rejected by the learned judge. The appellants had alleged that there was procedural impropriety and that the decision was, amongst others, irrational.

Procedural Impropriety

[100] The appellants had alleged that there was procedural impropriety in that r. 5(8) of the Planning Rules had not been complied with; and that no reasons were given for the Datuk Bandar's decision. Rule 5(8) requires the Datuk Bandar to convey to the relevant persons a written decision on the application and the objections raised.

[101] To recapitulate the learned judge's views on r. 5(8), His Lordship found that this did not arise since the appellants lack *locus standi*. The learned judge further found that in any event, the Datuk Bandar had informed the first, second and sixth appellants *vide* letter dated 20 July 2017. As for the duty to give reasons, there was no prescription for such duty and so there was no question of dereliction or non-compliance.

Rule 5(8) Of The Planning Rules

[102] Rule 5(8) needs to be read with r. 5(7):

> (7) The Commissioner may, after taking into consideration the objections, if any, grant or refuse to issue the planning permission in respect of the proposed development.
>
> (8) The decision of the Commissioner shall be conveyed in writing and sent by way of registered post to the applicant and those who have filed their objections.

[103] The learned judge had also remarked that any non-compliance of r. 5(8) "cannot be a ground to quash the decision" since "judicial review pertains to the decision making process as well as its legality, rationality and reasonableness in arriving at the said decision" and r. 5(8) "relates to an act after the decision has been made."

[104] With respect, we disagree. Judicial review pertains to reviewing the decision reached by examining if the relevant law and procedure have been complied with without any breach of the rules of natural justice; that there has been fair play and that the parties concerned have been given an opportunity to be heard and to address the relevant matter under consideration before the decision is reached. The review does not stop at the door of decision; it extends to the decision itself and how or whether that decision was ever communicated to the persons affected by the decision, adversely or otherwise. It goes without saying that in the process, the contents of the decision will come under scrutiny.

[105] The court must not artificially draw an imaginary line restricting our powers to judicially scrutinise the administrative decision of the Datuk Bandar. These powers are exercised in the public interest and for public good and insofar as the Datuk Bandar is concerned, for better administration of duties and powers conferred by the relevant legislation; in this case Act 267, the Planning Rules, to name a few. The burden, in public law, would be on the Datuk Bandar to thus show how the process has been adhered to and not, the other way round.

[106] Putting aside the purported notification of decision *vide* letter dated 20 July 2017 which we will examine shortly, the Datuk Bandar's submission is that there is no duty to inform due to lack of *locus standi*. Let us put the appellants into two categories – the first comprised the first, second and sixth

appellants who the Datuk Bandar notified of the hearing and later sent its decision on 20 July 2017; the second comprised the rest who though not notified, attended the hearing.

[107] Both categories are alleged to lack *locus standi*, yet the facts show that the Datuk Bandar took no issue at any time until the judicial review proceedings were filed. This makes the Datuk Bandar's position quite inconsistent, more so when we factor in the Datuk Bandar's failure to notify some of those who attended the hearing the outcome of their objections raised at the hearing. Since we have found that His Lordship has plainly erred in the appreciation of the law on *locus standi* under O. 53 and had thus misapplied it to the facts, His Lordship's interpretation and conclusion on r. 5(8) is also erroneous.

[108] In any event, given our views earlier that there is a common law duty to inform the adjoining landowners of a hearing and of their right to attend and express their concerns at the hearing, it makes sense that there is a corresponding duty on the Commissioner, that is, the Datuk Bandar, to inform those who attended of the decision made, the outcome of the hearing and the response to their objections and/or concerns. The presence of r. 5(8) amplifies this requirement especially in relation to the applicant for planning permission and to those who objected. Since these other appellants were not informed of the decision, there is clearly procedural impropriety in the decision reached which renders the development order granted, liable to be quashed.

[109] We find support for this view on the need for the procedural requirements of Act 267 and the Planning Rules to be strictly adhered to, in the decision of *Datin Azizah Abdul Ghani v. Dewan Bandaraya Kuala Lumpur & Ors And Another Appeal* [1992] 1 LNS 28; [1992] 2 MLJ 393 (see also *Council of Civil Service Unions v. Minister for the Civil Service* [1984] 3 All ER 935). In *Datin Azizah Abdul Ghani*, the Datuk Bandar had improperly issued a notice pursuant to the Planning Rules leading the Federal Court to conclude that on the facts, no notice as required under the Planning Rules was given to the appellant. Consequently, the planning permission was quashed.

[110] Aside from the above was this interesting argument by the appellant in *Datin Azizah Abdul Ghani*'s case – that Act 267 did not expressly prohibit the Datuk Bandar from inviting the views of the adjoining landowners when making a development order. By virtue of s. 22(4) of Act 267, the Datuk Bandar is required to take into account 'any other material consideration' and the adjoining landowners' views and objections were such material consideration.

[111] The Federal Court implicitly agreed with that line of submission and held that the procedural requirements of Act 267 and the Planning Rules must be complied with; the failure of which rendered the development order liable to be quashed; and the Federal Court did so accordingly. On this ground alone, the impugned decision in the present appeal before us is thus liable to be quashed.

Duty To Give Reasons

[112] Then, there is the matter of duty to give reasons. We would have thought that the law on this issue is fairly clear and settled from the early years of *Rohana Ariffin & Anor v. Universiti Sains Malaysia* [1989] 1 MLJ 487 where it was ruled that a "reasoned decision can be an additional constituent of the concept of fairness" and where the reasons have to be given so that the right of appeal may be properly and meaningfully exercised; to *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1 (*MPPP*) where the Federal Court extensively reasoned on why there must be this duty to give reasons even if there is no express provision for such duty. According to the Federal Court, this duty to give reasons emanates from the concept of fairness; see also *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2017] 4 CLJ 265 and *Mohamad Hassan Zakaria v. Universiti Teknologi Malaysia* [2017] 10 CLJ 36. (See discussions of the same in *Save Britain's Heritage v. Secretary of State for the Environment & Others* [1991] 2 All ER 10).

[113] The absence of an express provision in any statute requiring the decision-maker to give reasons does not mean that the duty does not exist unless and until the statute specifically states so. Even then, the case law has developed progressively to instill an innate will on public authorities to explain their decisions. The Federal Court in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd* categorically held that "The absence of such a provision ought not to be regarded as a cloak under which the decision-maker can hide his rationale for making the decision, privy only to himself but a mystery to the interested parties or the public at large".

[114] We cannot see how the instant appeal is any different; on the contrary, there can only be responsible and proper planning if the Datuk Bandar who approves or rejects any planning permission explains its reasons to all concerned, especially the appellants in this appeal.

[115] We add that there is even more reason to say that there is a duty to give reasons without it being expressly provided in Act 267 or the Planning Rules due to the presence of an elaborate mechanism for notification of hearing, invitation to a hearing to express concerns or views before a decision is made on a planning application, as we have in the case of the Planning

Rules under Act 267. It makes no sense to have such a procedure, statutorily provided, yet, not adhered to. The procedure tells the public, including the appellants this is how it will act where there is an application. Having held out to the appellants the procedure to which they respond, the Datuk Bandar cannot sit back, fold its arms and say that it is not required to explain or honour its practice, unless, of course, there is good reason not to do so.

[116] As explained by the Supreme Court in *Mandalia v. Secretary of State* [2015] UKSC 59, [2016] 4 All ER 189 at p. 199, the appellants' right to the determination of Yayasan and Memang Perkasa's application for planning approval according to Act 267 and the Planning Rules "is now generally taken to flow from a principle, no doubt related to the doctrine of legitimate expectation but free standing". The better administration of local government in such a critical area of planning and development impacting both directly and indirectly on the daily lives of the residents under that local government calls for every responsible local government including the Datuk Bandar, to account for its actions and decisions by providing reasons for them.

[117] Giving reasons without being compelled, is not just grounded in fairness but, as expressed by the Supreme Court in *Mandalia v. Secretary of State for the Home Department* (*supra*) citing Laws LJ in *R (on the application of Nadarajah) v. Secretary of State for the Home Department* [2005] EWCA Civ 1363, [2005] All ER (D) 283 (Nov) "a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public". This results in better decision-making, or better informed decision-making and it reflects the 'democratic principle at the heart of our society' as expressed in *R (on the application of Moseley) v. Haringey London Borough Council* [2015] 1 All ER 495.

[118] Similar views were expressed by the Federal Court in *MPPP* (*supra*). After discussing amongst others, *Rohana Ariffin & Anor v. Universiti Sains Malaysia* (*supra*) where it was ruled that "a reasoned decision can be an additional constituent of the concept of fairness"; and agreeing with the Privy Council decision in *Dr Stefan v. The General Medical Council* [1999] 1 WLR 1293 that despite the absence of express statutory obligation to state reasons and neither could it be implied such an obligation, the Privy Council found that there was power to give reasons, as:

> … giving reasons can be beneficial and assist justice: (1) in a complex case to enable the doctor to understand the Committee's reasons for finding against him; (2) where guidance can usefully be provided to the profession, especially in difficult fields of practice such as the treatment of drug addicts; and (3) because a reasoned finding can improve and strengthen the appeal process.

the Federal Court proceeded to hold at p. 123 (CLJ); p. 64 (MLJ):

> We endorse the principles enunciated by the Privy Council in *Dr Stefan* and say that in the exceptional circumstances of this case and having regard to the trend towards increased openness in matters of Government and administration, as a matter of fairness, reasons should have been given by the Council as to why it was imposing the disputed condition and thus resiling from the original approval of planning permission which was free from any pricing condition …

[119] In *Pembinaan Batu Jaya Sdn Bhd v. Pengarah Tanah dan Galian Selangor & Anor* [2016] 5 CLJ 250; [2016] 5 MLRA 503, Abang Iskandar JCA (now CJSS) when dealing with the issue of duty to give reasons in the context of revocation of alienation of land expressed the following view:

> [45] … the principle as stipulated in the *Sri Lempah Enterprise* case (*supra*) is applicable in cases involving exercise of discretion, absolute or otherwise. High authorities have shown such phrase to be a gross anomaly that cannot pretend to even co-exist. (See for instance: *Pyx Granite Co Ltd v. Ministry of Housing and Local Government* [1958] 1 All ER 625]. In exercise of a public power, there is no escaping the obligation on the part of the decision-maker to act reasonably in the peculiar circumstances of the case that appears before him. One of the fundamental features in modern administrative law jurisprudence has been the growing need for the public decision-maker to give reasons for his decision. It may be inconvenient to do so. But it is an indivisible component in all decision-making processes. We find that every decision, both good and bad, is driven to such conclusion by a reason. Learned Justice Zainun Ali JCA (as she then was) in the case of *Datuk Justin Jinggut v. Pendaftar Pertubuhan* [2012] 3 MLJ 212 had said this:
>
> > Thus if no reason is given by the respondent, it is open for this Court to conclude that he had no good reason in as much as it is open for us to conclude that the respondent had not exercised his discretion in accordance with the law.

[120] His Lordship further added:

> … we could not find any statute which contains express provisions that affirmatively prohibit a public officer, as a decision-maker, in the discharge of his public duty, from assigning any reason for his decision. Indeed, it would be most strange, if there was one such statute. We say so because it would defeat the essence of good governance and that it would not promote accountability and owning up to responsibility in decision-making. As such, the silence in a statute requiring that a reason or reasons be given by the decision-maker ought not to be taken to mean there was therefore no duty to give reasons. The silence in the statute, on the duty to give reason for a decision, ought not to be made a cloak or a blanket under which the decision-maker could conveniently find refuge so that

> the rationale for his decision remains shrouded in mystery, privy only to himself, but not to the public at large, on whose behalf, he is entrusted to discharge that duty. That scenario would indeed be a contradiction in terms.

[121] We understand that in the facts of this appeal, the decision was only communicated after the application for judicial review was filed and leave was granted (decision delivered on first and second appellants on 25 August 2017 while the sixth appellant claimed to have never received the letter). This is both troubling and disappointing as clearly, for the duty to give reasons to have any meaning, the decision ought to have been communicated at the time when it is made. We find support for this in *R v. Westminster City Council ex p Ermakov* [1996] 2 All ER 302 where the English Court of Appeal held that "reasons should be given at the same time as the decision was communicated, it followed that if no reasons or wholly deficient reasons were given, an applicant for judicial review was *prima facie* entitled to have the decision quashed as unlawful, whether or not he could show that he had suffered any prejudice thereby." The timing is material for the recipient of the decision to make an informed decision as to the next course of action or conduct.

[122] Another significant factor that seems to be overlooked is that it is the reasons, if any, stated or proffered at the material time which forms the basis of examination; not the explanations that are penned in the affidavits filed in response. Any explanations found in the affidavits of reply should be treated as merely elucidatory. This was cautioned by the Court of Appeal in *R v. Westminster City Council ex p Ermakov*, pp. 303, 316; and we share in those views.

[123] In *R v. Westminster City Council ex p Ermakov*, the Court of Appeal held that although the court could, in appropriate cases, admit evidence to elucidate or exceptionally, correct or add to the reasons given at the material time:

> … it would be very cautious about doing so; the function of such evidence would generally be elucidation, not fundamental alteration, as for example where an error had been made in transcription or expression, or a word or words had been inadvertently omitted. However, in cases where the reasons stated in the decision letter had been shown to be manifestly flawed, it should only be in very exceptional cases that relief should be refused on the strength of reasons adduced in evidence after the commencement of proceedings, even where it was clear that on reconsideration by the authority the decision would be the same. It follows that efforts to secure a discretionary refusal of relief by introducing late evidence of true reasons significantly different from the stated reasons are unlikely to succeed (see *dictum* of Steyn LJ in *R v. Croydon London Borough Council, ex p Graham* (1993) 26 HLR 286).

[124] In short, the court should be examining the reasons which were given contemporaneously with the communication of the decision. The court should not be looking elsewhere. Thus, it is what the letter of 20 July 2017 states that form the reasons under examination and not the clarifications or elucidations that subsequently emerge in the affidavits filed. If the reasons stated in the letter are manifestly flawed, it should only be in very exceptional cases that the court would refuse the relief sought.

[125] In any event, having examined the letter of 20 July 2017 which was sent to the second appellant, we do not find that it meets the terms of r. 5(8). The letter reads:

> Tuan,
>
> **Cadangan pemajuan mengandungi:**
>
> 1. **Pelan susunatur pecahan sempadan**
> 2. **Menukar kegunaan tanah daripada kediaman kepada perdagangan di atas sebahagian tanah**
> 3. **Menambah kepadatan penduduk daripada 60 ose kepada 979 ose di atas sebahagian tanah**
> 4. **Pembangunan 8 blok komersil (pangsapuri servis) dan 1 blok kediaman pangsapuri mampu milik 29 tingkat (350 unit) di atas PT 9244 Jalan Tun Mohd Fuad, Bandar Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur – Maklumbalas terhadap pandangan yang dikemukakan**
>
> Saya dengan hormatnya diarah merujuk kepada surat tuan yang diterima pada 27.6.2016 terhadap perkara di atas. Dewan Bandaraya Kuala Lumpur (DBKL) amat menghargai pandangan yang dikemukakan oleh pihak tuan.
>
> 2. Untuk makluman tuan, permohonan di atas beserta pandangan yang dikemukakan oleh tuan telah dipertimbangkan oleh Datuk Bandar Kuala Lumpur di Mesyuarat Jawatankuasa Pusat Setempat pada 30.3.2017. Datuk Bandar telah mengambil maklum pandangan yang dikemukakan oleh tuan dan telah memberi Perintah Pembangunan di atas pada 13.7.2017 berasaskan justifikasi-justifikasi berikut:
>
> i. Jalan keluar masuk ke tapak pembanguan adalah melalui Jalan Damansara terus melalui jalan bertingkat (2 lorong masuk dan 2 lorong keluar) yang dibina oleh pemohon ke tapak cadangan.
>
> ii. Jalan keluar masuk tidak dibenarkan melalui Jalan Wan Kadir 1 dan Jalan Datuk Sulaiman. Jalan ini hanya digunakan sebagai akses ke rumah mampu milik dan kuil sahaja.
>
> iii. Pematuhan kepada kehendak teknikal perancangan berkaitan kawasan 'plinth', anjakan bangunan, kawasan lapang, penyediaan kemudahan penduduk dan penyediaan tempat letak kenderaan.

iv. Pemaju tidak membuat apa-apa cadangan pembangunan yang melibatkan taman awam sedia ada. Cadangan jalan keluar masuk dan naiktaraf infrastruktur hendaklah dibuat di dalam tapak cadangan pemohon.

v. Pemaju juga dikehendaki membina 60 petak tempat letak kereta yang baru untuk pengguna ke taman.

3. Walau bagaimanapun bagi memastikan penduduk sekitar mendapat maklumat yang lebih terperinci dan komprehensif berkenaan dangan pembangunan dicadangkan, DBKL telah mensyaratkan agar pemaju mengadakan "communication strategy" iaitu proses penerangan oleh pemaju kepada penduduk sekitar tapak pembangunan berkenaan dengan perlaksanaan projek yang akan dibangunkan kelak. Bagi tujuan itu, pemaju perlu melaksanakannya melalui 2 kaedah iaitu:

i) Menyediakan edisi khas di dalam 2 surat khabar iaitu berbahasa Inggeris dan Melayu untuk memaklumkan kepada orang awam mengenai pembangunan yang akan dijalankan. Pemaju hendaklah berhubung dengan Jabatan Perancangan Bandaraya Kuala Lumpur untuk semakan terhadap kandungan edisi khas tersebut sebelum ia dikeluarkan.

ii) Mengadakan perjumpaan dengan penduduk sekitar bagi memberi penerangan mengenai pembangunan yang akan dijalankan supaya penduduk di kawasan sekitar mendapat maklumat yang jelas terhadap pembangunan ini dan dapat mengetahui faedah yang diperolehi oleh mereka daripada perlaksanaan projek tersebut.

Sekian, terima kasih

Pengarah
Jabatan Perancangan Bandaraya
Dewan Bandaraya Kuala Lumpur

[126] It is obvious from the opening paragraph of the above letter that it was written in response to the second appellant's letter dated 27 June 2016. It is not and neither does it purport to be a letter written pursuant to the statutory requirements of r. 5(8) of the Planning Rules, that is, to inform the second appellant of its decision following the hearing on 29 August 2016, a hearing which was held pursuant to r. 5(6) and what the Datuk Bandar's responses are to the objections raised at the hearing. We further note that the appellants had raised many issues at the hearing, (see para. 23 above).

[127] From the contents of this letter, while the Datuk Bandar is not obliged to accept or reject the objections, the objections must nevertheless be addressed. It makes no sense if it was construed otherwise, and it would go against the entire intent of Act 267 and the Planning Rules, to have notices sent out, to hold hearings, and then, silence and no explanation.

[128] The fact that not all the matters as raised by the appellants are addressed lends weight to the appellants' submission that this letter of 20 July 2017 is indeed, not a written response issued under r. 5(8) of the Planning Rules. Consequently, the failure to adhere to its own Planning Rules renders the decision reached liable to be quashed.

[129] As we have mentioned earlier, the Federal Court in *Datin Azizah Abdul Ghani v. Dewan Bandaraya Kuala Lumpur & Ors And Another Appeal* (*supra*) quashed the development order upon finding that there was non-compliance of Act 267 and the Planning Rules. Similarly, the non-compliance of r. 5(8) has prejudiced and adversely affected the appellants here in the terms complained of. The position is compounded when we consider the fact that not all the appellants were ever informed by the Datuk Bandar of the outcome of their objections voiced at the hearing on 29 August 2016. The appellants were only told after the judicial review application was filed; and that is far too late.

[130] Of significance too, is the fact that the first, second and sixth appellants were only informed of the grant of the development order after it had already been granted. This is evident from para. 2 of the Datuk Bandar's letter of 20 July 2017; the development order was issued on 13 July 2017. For the right under r. 5(8) to be a meaningful one, the decision on the development order ought to have been communicated to the appellants at the same time Yayasan and Memang Perkasa were informed. As it is, the appellants only learnt of the decision on 28 July 2017 after noticing Memang Perkasa carrying out survey works on the subject land; and from a written parliamentary reply dated 10 August 2017 issued by the then Minister of Federal Territory.

[131] Bearing in mind that the Datuk Bandar has taken the view that the appellants have no *locus standi* to start with, a view that was not always held, it throws up in question why the hearing was even called in the first place. As opined in *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223, the exercise of discretion "must be a real exercise of the discretion"; anything less will be construed as paying lip service to the statutory requirements, and that the hearing is as good as none. For this added reason, the impugned decision is invalid for reasons of procedural impropriety and ought to be quashed.

KL Structure Plan And KL Local Plan

[132] We deal next with the matter of the KL Structure Plan and the KL Local Plan and this is where s. 22 of Act 267 needs to be examined in fair detail as the essence of the appellants' complaint is that there is irrationality, unreasonableness in the non-adherence to these plans.

[133] The appellants had contended that the proposed development contravenes the terms of the KL Structure Plan and the KL Local Plan in that under the KL Structure Plan, the subject land has been demarcated as a public open space, recreational and sports area, green area and city park; whilst the KL Local Plan has demarcated Taman Rimba Kiara as a city park and public open space with zero development intensity. This was rejected by the learned judge on the ground that s. 22(4) only requires the Datuk Bandar "shall as far as practicable have regard to" the provision of the development plan and where the local plan has not been adopted, the comprehensive development plan.

[134] The decisions of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor Dengan Tanggungan* (*supra*) and *Ramachandran s/o Appalanaidu & Ors v. Dato Bandar Kuala Lumpur & Anor* were cited in support where in the earlier case, the Federal Court adopted the approach taken by *Simpson v. Edinburgh Corporation* [1960] SC 313, 318 in dealing with planning permission applications in the context of the structure plan. In *Simpson*, Lord Guest had construed the term "have regard to the provisions of the development plan" as not carrying the meaning of "slavishly to adhere to"; all that was required of the local authority was "to consider the development plan", but it is not obliged to follow it.

[135] Section 22 states:

> **Development order**
>
> 22(1) The Commissioner shall have power exercisable at his discretion to grant planning permission or to refuse to grant planning permission in respect of any development irrespective of whether or not such development is in conformity with the development plan; provided however the exercise of the discretion by the Commissioner under this subsection shall be subject to subsection (4) and section 23.
>
> (2) Where the Commissioner decides to grant planning permission in respect of a development he may issue a development order:
>
> (a) granting planning permission without any condition in respect of the development
>
> (b) granting planning permission subject to such condition or conditions as the Commissioner may think fit in respect of the development:
>
> Provided that the Commissioner shall not issue a development order under this subsection unless he is satisfied that the provision of section 41 relating to the assessment of development charges has been complied with.
>
> (3) Without prejudice to the generality of paragraph (2)(b), the Commissioner may impose any or all of the following conditions:

A (a) to the effect that the development order granting planning permission in respect of any change of use of land or building is only for a limited period and after the expiry of that period the use of the land or building as authorised under such development order shall cease to have any effect and the land or building shall be reverted to its original use; and

B (b) to regulate:

(i) the development and use of any other land which is under the control of the applicant and which is adjoining the land for which planning permission is to be granted for the development thereof; and

C (ii) the works that may be carried out on such other land in the manner and to the extent as may appear to the Commissioner to be expedient with regard to the development for which planning permission is to be granted.

D (4) The Commissioner in dealing with an application for planning permission *shall take into consideration such matters as are in his discretion expedient or necessary for purposes of proper planning and in this connection but without prejudice to the discretion of the Commissioner to deal with such application, the Commissioner shall as far as practicable have regard to:*

E *(a) the provisions of the development plan and where the local plan has not been adopted, the Comprehensive Development Plan; and*

(b) *any other material consideration:*

Provided that in the event of there being no local plan for an area and the Commissioner is satisfied that any application for planning permission should not be considered in the interest of proper planning until the local plans for the area have been prepared and adopted under this Act then the Commissioner may either reject or suspend the application.

F (5) Upon the receipt of an application for planning permission the Commissioner shall within such time as may be prescribed either grant or refuse the application and when the application is granted subject to the condition or refused, the Commissioner shall give his reasons in writing for his decision.

G (6) Where a development order is granted, whether with or without conditions, it shall be conveyed to the applicant in the prescribed form.

(emphasis added)

H **[136]** Section 22 mentions various types of plans – development plan, comprehensive development plan and local plan. These terms are defined in s. 2 of Act 267 together with the term "structure plan":

"Comprehensive Development Plan" means the comprehensive development plan referred to as plans Nos.: 1039, 1040 and 1041 in the "City of Kuala Lumpur (Planning) Act 1973 [Act 107];

I

"development plan", in relation to an area means: A

(a) the local plan for the area; or

(b) if there is no local plan for the area, the structure plan for the area;

and, in relation to any land or building, means the development plan, as so defined, for the area in which the land or building is situated; B

"local plan" in relation to an area, means the local plan as prepared under section 13;

"structure plan", in relation to an area, means a written statement accompanied by diagrams, illustrations and other descriptive matter containing policies and proposals in respect of the development and use C of land in the area and may indicate action area; and "draft structure plan" shall be construed as the test requires.

[137] In *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805; [2008] 6 MLJ 704, the Court of Appeal came to the conclusion that the KL Structure Plan is "a document stating the vision, D policies and goals to guide development of Kuala Lumpur" from its introductory paragraph:

3. The Kuala Lumpur Structure Plan 2020 (the Plan) contains the visions, goals, policies and proposals to guide the development of Kuala Lumpur (the City) over the next 20 years. It does not contain proposals for E detailed physical planning for any specific area. Detailed physical proposals shall be relegated to a subsequent stage of the development plan, that is, the local plan.

[138] Consequently, the Court of Appeal rejected the proposition of the appellant there that the KL Structure Plan "is a legally binding instrument"; F and instead agreed with the respondent that "it is a document merely stating the policies of the first respondent and thus not legally binding on anyone"; that it is "also not a piece of legislation which imposes a public duty upon the first respondent to perform any specific act".

[139] With respect, we find it hard to agree with that conclusion, in G particular, that the KL Structure Plan is not legally binding on anyone.

[140] A useful elucidation of how the comprehensive development plan (CDP) which is to be found in plan nos.: 1039, 1040 and 1041 in the "City of Kuala Lumpur (Planning) Act 1973 (Act 107)" came to pass can be found in the Court of Appeal decision of *Datuk Bandar Kuala Lumpur v. Zain Azahari* H *Zainal Abidin* [1997] 2 CLJ 248; [1997] 2 MLJ 17 at pp. 24 to 27. We do not propose to repeat it. We do, however, wish to say that the three gazetted plans in the CDP mark out the different areas of the city of Kuala Lumpur comprising initially 93 square kilometers or 36 square miles to later to 243 square kilometers or 94 square miles; and that this CDP is actually a long I term plan for the urban development of Kuala Lumpur.

[141] Development plans thus comprise the CDP, structure plan and local plan. Each differs in terms of details and objective or purpose of the plan. The effort, time, labour, cost and expense, not forgetting the huge public input after the draft plans have been publicised and feedback from the public gathered from public inquiries etc., that go into the preparation of each of these plans is extensive to say the least. These plans are prepared under command of law, Act 267 (in particular s. 10) and also the Town and Country Planning Act 1976 (Act 172) where it can be seen that structure plans are also required to be prepared at State levels. None of these plans can be passed and be of any force unless and until the time-consuming and painstaking process of preparing drafts; publication of those drafts through the requisite mediums; consultation and public hearings on the drafts; adoption, adaptation, repeal, replacement of drafts from the results of the consultation; consent of the Minister in charge, all elaborately set out in Act 267 have been complied with.

[142] We agree with the submissions of the appellants that the development plan in the form of the KL Structure Plan is a carefully drafted and considered statement of policy. After all, it concerns the capital city of the Nation, not just about the planning of its development, but its **proper** planning. This is in line with the vision envisaged for the capital city that is consistent with the national vision of Kuala Lumpur – World Class City. That vision "encapsulates the ambition to make Kuala Lumpur a city that will assume a major global and sub-global role for the benefit of all its inhabitants, workers, visitors and investors" – see p. 2441 of the record of appeal.

[143] There are 18 parts in the KL Structure Plan with details of "relevant separate components that make up the City". Those separate and discrete components are "its economic base and population, land use and development strategies, commerce, tourism, industry, transportation, infrastructure and utilities, housing, community facilities, urban design and landscape, environment and special areas". The structure plan alerts the reader or user that the separate components "are interrelated and mutually contingent". Consequently, "policies and proposals for each of these components are therefore, directed towards their composition into an integrated whole, that is, the efficiently functioning, progressive and felicitous city" – see p. 2430 of the record of appeal.

[144] The KL Structure Plan thus guides the Datuk Bandar in how a decision on any application for planning permission to develop any area in the capital city will be approached, considered and dealt with in the many respects of those components in the structure plan; and it is reasonable to say that the public or at least the residents of KL would be entitled to expect that to be

the case. If the Datuk Bandar, the 'authorised producer', so to speak of these plans, does not consider these plans material considerations, it is of great worry who then will.

[145] While the KL Structure Plan may contain visions, goals, policies and proposals, these same visions and policies serve as guides upon which development and use of land and buildings are dependent on and undertaken. The uniqueness of the KL Structure Plan and for that matter any structure or local plan is that it is dynamic, given that it is prepared *in futuro*, for the future. But, at the same time, it recognises that it needs to be adaptable to be adoptable; that it may need to be amended from time to time due to change of use or development, change of policies, economic-socio changes, migration of population and so much more. It is not rigid but its adaptability and flexibility and how the Datuk Bandar as Commissioner, is to take and execute or implement it in its consideration of applications for planning permission cannot and does not render the KL Structure Plan, Local Plan or even the CDP, any less legal. The amendments which are really in the nature of updates are however, not rampant; neither are they as frequent as one imagines them to be. The KL Structure Plan 2020 has been around for over 20 years and its significance gains sharper focus when a draft local plan is also prepared.

[146] Ultimately, the object of all these plans are for proper control and regulation of planning of the development and use of all lands and buildings in the area of the local authority. Offices, both private and public, schools, factories, recreational areas, commercial areas, homes and everything else that is conceivable in the use of lands and buildings are, directly or indirectly affected by the KL Structure Plan. Lives and economies, the way of living, are all planned around this KL Structure Plan, whether of long or short duration. The residents of Kuala Lumpur, including the appellants relied on these plans such that it would be fair to say that there is a certain measure of holding out by the Datuk Bandar to confer a legitimate measure of expectation that the details in the KL Structure Plan, in particular the use of the lands as demarcated will be honoured. And, that if there is to be any change, there will be full consultation, clarification or explanations, and accountability.

[147] The use of land or building which is otherwise than in conformity with the development plan or the planning permission granted under Act 267 actually carries penal consequences. This is set out in s. 26 of Act 267 and other implications are as found in ss. 27 to 29 of the same. From the terms of s. 22(4) read with s. 22(1), the KL Structure Plan as is the case with the CDP and the local plan cannot be disregarded by anyone, least of all, the Datuk Bandar. It forms the basis for approval or rejection of any application for planning permission, or to impose conditions for such decisions of approval.

[148] In *Dato' Mohamad Yusof A Bakar & Anor v. Datuk Bandar Kuala Lumpur* [2019] 1 LNS 1494, the Court of Appeal described the KL City Plan 2020 as mapping "out the city area and its specific land use. The purpose of zoning laws is to determine what type of business or residence can be placed in different parts of the city or a residential area". The Court of Appeal found the inquiry prescribed under r. 5 of the Planning Rules "is an essential and important process as the main objective of the aforesaid Rules is to assist the respondent in determining whether the proposed development is proper or inappropriate for the purpose of proper planning. The respondent as the Commissioner, regulates, controls and plans the development of all lands within the Federal Territory and the use of such lands and buildings has an obligation to exercise it reasonably and in accordance with the terms of the relevant statute that confers the power or discretion. As a planner and regulator, the respondent must ensure that the interests and wellbeing of the residents have been duly considered before approving or rejecting any application for planning permission in particular where the proposed development which involves an increase in residential density or change of use of land".

[149] We add that that responsibility and duty can only reasonably and properly be discharged if the CDP, structure plan and the local plan, were compendiously referred to as the source, reference or basic legal document upon which any planning permission is to be evaluated at the time the application is being considered. This reference must, at the very least, be apparent from the terms of the decision under challenge.

[150] The legal status of a structure plan was in fact recognised by the Federal Court in *MPPP* where Edgar Joseph Jr FCJ said:

> By s. 22(2) of the Act, it is provided that in dealing with an application for planning permission, the local planning authority 'shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and in particular *inter alia*, the provisions of the Development Plan'. These statutory provisions are equivalent to s. 70(2) of the UK Town and Country Planning Act. In this context, the cases of *Kissell v. Secretary of State for the Environment* (1993) TLR, 22 July at p. 32, *Etherridge v. Secretary of State for the Environment* (1991) EGCS 28, *Good v. ex p Monahan* [1989] 3 WLR 408 (the *Royal Opera House Covent Garden* case) are relevant and show that **the Structure Plan has legal status and cannot be disregarded,** as counsel for the Society implied by his submission.
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> It is also obvious that the statutory requirement in s. 22(2) of the Act 'to take into consideration' to the provisions of the Development Plan does not mean that the local planning authority must slavishly comply with it. It will suffice if it considers the Development Plan without incurring the obligation to follow it. (See, Lord Guest in *Simpson v. Edinburgh Corporation* [1960] SC 313; *Enfield London Borough Council v. Secretary of State for the*

Environment (1974) 233 EG 53). But, note the two situations – not material to the present case – where the planning authority would be debarred from granting planning permission (s. 22(4) of the Act).

(emphasis added)

[151] In our view, s. 22(4) confers the Datuk Bandar, as the Commissioner, a discretion in relation to whether an application for planning permission ought to be favourably or otherwise considered, with or without terms and the nature of those terms to be imposed. This discretion is not unfettered. In the context of s. 22(4), and this is recognised in s. 22(1) itself and expressly reserved by His Lordship in *MPPP*, the expression used is "shall" – the Datuk Bandar is directed to take into consideration such matters as are expedient or necessary for the proper planning of the development, and the local area.

[152] Even in that regard, it is not open-ended. Once again in mandatory language of "shall", the Datuk Bandar is specifically directed to have regard to the provisions of the development plan and where the local plan has not been adopted, the comprehensive development plan; and any other material consideration. Clearly and quite obviously, the CDP, structure plan and local plan are material considerations – see *Bath Society v. Secretary of State for the Environment & Others* [1992] 1 All ER 28. So, if these plans were not taken into regard at the material time, the decision reached is invalid; and no reason or explanation given later at the judicial review proceedings can change that as it must be apparent from the decision communicated to the appellants how the concern about the KL Structure Plan was addressed.

[153] The proviso to s. 22(4) is even more telling. It provides that where there is no local plan for the area, the Commissioner may, in the interest of proper planning, decide not to consider any application for planning permission until the local plan has been prepared and adopted. Meanwhile, until then, the application may be suspended or even rejected.

[154] Understood in all that light, it is difficult to see how the KL Structure Plan can be said to have no legal binding effect on anyone. The Commissioner, the Datuk Bandar is bound to have regard to the CDP, structure plan and local plan in its consideration of any application for planning permission. These plans are, in our view, in any event, not only specific requirements of the law but are material considerations against which the application for planning permission had to be assessed. The requirement of taking the plans and material considerations into account is a question of law but what weight the Datuk Bandar chooses to give to each of the matters in the structure plan etc. is a matter of planning judgment. But, if the Datuk Bandar does not explain this aspect carefully, or to merely assert that it has been taken the plan into account without more, the court is entitled to reach the reasonable conclusion that there has been no proper compliance of the law.

[155] In our view, it is actually imperative on the part of the Commissioner, the Datuk Bandar, to ensure that the application for planning permission is consistent with such plan and to decide what conditions to impose if it is not, or even to reject or suspend such application where there is no such plan. What really is to be avoided is the 'slavish compliance'; but even then, it is excluded in the context of s. 22(4) where compliance is paramount or key to the consideration of the application for planning permission. Any departure from the structure plan must be for good reason and such reason has to be properly explained in writing at the material time of decision. And, it is these reasons that are the subject of scrutiny when challenged in judicial review proceedings.

[156] The planning laws of Malaysia are similar to the planning laws of the UK. When we turn to the cases there, we find support for this approach.

[157] The leading case is *Tesco Stores Ltd v. Secretary of State for the Environment and Others* [1995] 2 All ER 636 where Lord Hoffman summarised the function of the court in an application for judicial review to quash the Secretary of State for the Environment's decision for failure to take into account material contributions:

> The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority had regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as material consideration therefore involves no view about the part, if any, which should play in the decision-making process.
>
> This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State.

[158] This was followed by Lang J in *R (on the application of Hayes) v. Wychavon District Council* [2014] EWHC 1987:

> [11] The determination of an application for planning permission, and any appeal, is to be made in accordance with the development plan, unless material considerations indicate otherwise …

> [12] It is for the Courts to decide whether a matter is a relevant consideration; but it is for the decision maker to attribute to the relevant considerations such weight as he thinks fit. The courts will not interfere unless the decision-maker acts unreasonably in the *Wednesbury* sense (*Tesco Stores Ltd v. Secretary of State for the Environment and Others* [1995] 2 All ER 636, [1995] 1 WLR 759, 70 P & CR 184).

[159] Once again, we bear in mind the elaborate consultative process that we mentioned earlier when discussing the preparation and formulation of the structural and local plans, that all these were with statutory backing, that if the local authority is to depart from its own prescripts as evidenced in those plans, there must be very good reasons before the departure is endorsed. A proper explanation must be presented for the court to know whether the authority, the Datuk Bandar has properly fulfilled its statutory obligations.

[160] This was the approach of the House of Lords in *Nzolameso v. City of Westminster* [2015] 2 All ER 942, and we adopt the same:

> [31] The Secretary of State for Communities and Local Government has also intervened in this case, in order to emphasise that when making decisions about where to accommodate homeless persons, local authorities have a number of duties to evidence and explain their decisions. They are required to take the Code and Supplementary Guidance into account. If they decide to depart from them they must have clear reasons for doing so: see *R (on the application of Khatun) v. Newham London BC (Office of Fair Trading, interested party)* [2004] EWCA Civ 55, [2004] LGR 696, [2005] QB 37 (at [47]). Very good reasons are required to depart from a policy formulated after public consideration: *Royal Mail Group plc v. Postal Services Commission* [2007] EWHC 1205 (Admin) [2007] All ER (D) 444 (May) (at [33]). This is especially so where the Code is designed to protect vulnerable people: *R (on the application of Munjaz) v. Mersey Care NHS Trust* [2005] UKHL 58, [2006] 4 All ER 736, [2006] 2 AC 148. By definition, any homeless household in priority need will be vulnerable in this sense. The authority must also have a proper evidential basis for their decision: *R (on the application of Calgin) v. Enfield London BC* [2006] 1 All ER 112 (at [32]).
>
> [32] It must be clear from the decision that proper consideration has been given to the relevant matters required by the Act and the Code. While the Court should not adopt an overly technical or 'nit-picking' approach to the reasons given in the decision, these do have to be adequate to fulfil their basic function. It has long been established that an obligation to give reasons for a decision is imposed so that the persons affected by the decision may know why they have won or lost and, in particular, may be able to judge whether the decision is valid and therefore unchallengeable or invalid and therefore open to challenge: see *R v. Westminster City Council, ex p Ermakov* [1996] 2 All ER 302 at 309. Nor, without a proper explanation, can the court know whether the authority have properly fulfilled their statutory obligations.

[161] We further find support for our view in an old decision of the Federal Court in *Tok Jwee Kee v. Tay Ah Hock & Sons Ltd & Town Council, Johore Bahru* [1969] 1 LNS 193; [1969] 1 MLJ 195. There, the Federal Court had expressed the view that the local authority actually owes a statutory duty by reason of s. 145 of Town Boards Enactment No. 118 to take into account the concerns of the adjoining landowners and compliance with approved plans. Section 145 provides that "the Board shall refuse to approve the plan of any new building … unless such plan is in conformity with the approved plan". According to the Federal Court, "this duty is for the benefit not of the public generally but of individuals or of a particular or definable class of the public, and where there was no remedy, civil or criminal provided under the Enactment for any breach of s. 145 (either through oversight, ineptitude, indifference to the law or worse) resulting in damage to the owners of adjoining land in a residential zone …".

[162] In *Dato' Mohamad Yusof A Bakar & Anor v. Datuk Bandar Kuala Lumpur* (*supra*), a meeting or inquiry was held to hear objections of registered landowners of properties adjoining a proposed development on a plot of land, Lot PT 9885 into three blocks of apartments. PT 9885 was originally zoned as reserved land for a sewerage plant but in the draft KL City Plan 2020 of 2008, it was rezoned as an area for a community centre and open space. Amongst the grounds for challenge was the failure to give a full disclosure and that there was bias in the decision-making; with the residents complaining that there was a lack of detailed explanation and/or clarification by the respondent on the proposed development; and requests for technical reports being not forthcoming.

[163] In allowing the appeal of the residents, the Court of Appeal reiterated the "heavy responsibility" that the Commissioner has under Act 267 "to carry out its function with due care and diligence when considering an application for planning permission especially so, if the proposed development will impact on the density and traffic flow in the residential area. A decision by the respondent regarding any proposed development must not be done with haste"; that "public authorities must be reminded that the discretion conferred by statute is not unfettered as it imposes restrictions on the exercise of such discretion. It requires the respondent to take into account any objection and/or concern raised by persons who will be affected by the proposed development. There must also be a reasoned decision by the respondent when refusing or granting approval." And, it is for the Datuk Bandar to meet the challenge by adducing relevant and admissible evidence that the statutory requirements have been met at the material time – see *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* (*supra*).

[164] It is not in dispute that the subject land was demarcated as a public open space, recreational and sports area, green area and city park while under the local plan, Taman Rimba Kiara was demarcated as a city park and public open space with zero development intensity. It is apparent from the proposed development that both status would be permanently affected. How the Datuk Bandar proposed to address this aspect which was also raised by the appellants in their objections, is not at all clear from the decision reached and from the letter dated 20 July 2017.

[165] The appellants submitted that the learned judge erred in accepting the Datuk Bandar's bare averments in the affidavit filed that the KL Structure Plan and/or Local Plan had been adhered to as far as practicable for the proposed development. No evidence was produced in support, whether in the form of minutes of meetings, consultation papers or any written documentation.

[166] We have examined the Datuk Bandar's letter of 20 July 2017 once again, to see if it will yield the conclusion reached by the learned judge. The contents of this letter were set out earlier.

[167] Having examined it anxiously and closely, we cannot find any reference, direct or indirect, to the KL Structure Plan or even to the Local Plan or CDP. With the serious concerns and objections raised by the appellants under these plans, and having given the appellants and other residents a hearing on 29 August 2016, and being fully aware of those concerns, we would have expected, at the very least, the Datuk Bandar addressing these concerns and allaying them in the written reply. As opined in *Dato' Mohamad Yusof A Bakar*, the Datuk Bandar, "as planner and regulator" must ensure that the interests and well-being of the appellants as residents have been duly considered before the development order was issued. We do not see that role and duty fulfilled in the facts of this appeal at all.

[168] We are further of the opinion that the words in s. 22(4) requiring the Datuk Bandar "shall as far as practicable have regard to" the provision of the development plan and where the local plan has not been adopted, the comprehensive development plan, mean that these plans must be considered or taken into account and that there must be clear, objectively proper or legitimate reasons for any departure from the plans, including draft local plan, that the Datuk Bandar itself had prepared with such labour and effort under the law.

[169] We must add that it is not enough to merely advert to the plans – see *F & D Bonaccorso Pty Ltd v. City of Canada Bay Council (No. 2)* [2007] NSWLEC 537; and *Zhang v. Canterbury City Council* [2001] 51 NSWLR 589. More is required. In *Zhang*, it was held that the phrase 'have regard' calls for "sufficient information, an understanding of the matters and of the

significance of the decision to be made, and a sufficient process of evaluation sufficient to warrant the description of the matters being taken into consideration".

[170] There is, however, no need for the Datuk Bandar to provide 'compelling reasons' as was held in *R (on the application of Governing Body of the London Oratory School) v. School Adjudicator* [2015] All ER (D) 113; 'objectively proper reasons, or legitimate reasons' suffice. Unfortunately, even at this level, the test is not met for the reasons already discussed.

[171] The Datuk Bandar, as have the other respondents, sought to cite the relocation or housing of the Bukit Kiara Longhouses as the reason for the grant of the development order; that it was in their interest and for their welfare.

[172] With respect, we cannot see how the matter of Bukit Kiara Longhouses is a planning issue. It is a legacy or political issue which has no place in the considerations that the Datuk Bandar is required to take into account in exercising discretion under s. 22 of Act 267.

[173] In any event, we agree with the submissions of the appellants that the development order granted with such extensive change to or contrary to the KL Structure Plan where Yayasan and/or Memang Perkasa were required to put in an application for change of category of land use, required strict compliance of the procedure as set out in Act 267 and the Planning Rules. The development order granted was also disproportionate to the purported resolution of the matter of the Bukit Kiara Longhouses. This proposed development was and is, in truth and in reality, a pure business and commercial joint-venture between two entities, that is, Yayasan and Memang Perkasa, as evidenced by the clear terms of the JVA.

[174] The fact that the application for planning permission was based on titled land is irrelevant. We agree with the appellants that for planning purposes, the category of use as specified in the title documents is not the paramount consideration here; what is relevant is the development to which Yayasan and Memang Perkasa proposed to make in relation to the subject land and how it is regulated by Act 267. This was clarified in the Court of Appeal decision in *Majlis Perbandaran Subang Jaya v. Visamaya Sdn Bhd & Anor* [2015] 7 CLJ 27; [2015] 5 MLJ 554.

[175] Thus, we find that the learned judge was plainly in error in failing to hold that the Datuk Bandar had not exercised his discretion in accordance with the law when making the impugned decision. For this further reason, the impugned decision must be quashed.

[176] While on the matter of the decision of 20 July 2017, there is this other complaint – that the development order was not made by the Commissioner but by the Pengarah Jabatan Perancangan Bandaraya, thus rendering the development order to be *ultra vires* and/or improper. There were two letters, both of the same date of 10 April 2014, delegating powers first to the Timbalan Ketua Pengarah (Perancangan dan Kawalan) and later to Timbalan Pengarah.

[177] Having had sight of the development order dated 13 July 2017, it is evident to us that it was issued on behalf of the Datuk Bandar Kuala Lumpur in which case, we find the issue to be of no merit. Section 22 is clear in that the power is vested in the Commissioner to approve or reject the application for planning permission. Where it is approved, a development order is issued. So long as the development order is issued in the name of the Datuk Bandar, the order remains valid until successfully impugned. This however, does not answer the complaint that there is a conflict of interest.

Conflict Of Interest

[178] The substance of the appellants' argument here is that because the Datuk Bandar is a member of Yayasan's Board of Trustees, the Datuk Bandar is conflicted.

[179] This submission was rejected by the learned judge who found that the development order was not executed by the Datuk Bandar but by the Pengarah Jabatan Perancangan Bandaraya; that the Datuk Bandar in any event did not sit in at any of the meetings in relation to the application for planning permission; and that being a member does not prove the conflict of interest since there were at least eight other members on the Board.

[180] With respect, we disagree. This court in the decision of *Dato' Mohamad Yusof A Bakar & Anor v. Datuk Bandar Kuala Lumpur* (*supra*) had clearly and unequivocally held:

> The decision of any public authority may be reviewed on the grounds of illegality, irrationality and possibly proportionality which permits the courts to scrutinise the decision not only for process but also for substance (See: *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 FC). More so where the respondent in the particular facts and circumstances of this appeal is an interested party in the outcome of the respondent's decision. Such conditions call for greater caution where conduction such an inquiry. In essence, the general rule is that there is no such thing as an absolute or unfettered discretion; a discretion must be exercised reasonably (See: *Pengarah Tanah dan Galian v. Sri Lempah Enterprise* [1979] 1 MLJ 135).

[181] In *Dato' Mohamad Yusof A Bakar & Anor v. Datuk Bandar Kuala Lumpur* (*supra*), the registered owner of the land upon which planning permission was sought was Yayasan Wilayah Persekutuan. The Minister of Federal Territory was a director of Yayasan Wilayah Persekutuan as well as Chairman of the Jawatankuasa Kerja Tanah Wilayah Persekutuan which granted the land in the first place to Yayasan Wilayah Persekutuan. It was under those circumstances that the Court of Appeal allowed the appeal and found the presence of conflict of interest warranting the intervention of the court and the exercise of its supervisory powers.

[182] The Yayasan Wilayah Persekutuan in that appeal is the same Yayasan in the appeal before us. The fact that the application was made in the joint names of Yayasan and Memang Perkasa does not make any difference to the conclusion that there is present a conflict of interest between the applicant and the decision-maker who granted the development order. We must however, state for the record that our conclusions here do not in any way mean that there was personal interest on the part of the Datuk Bandar. We take the position that the commercial interests of Yayasan under the JVA (as explained at the outset) where the Datuk Bandar is a member of the Board of Trustees of Yayasan is sufficient to say that the test of conflict of interest has been met and tainting thus the development order granted by the Datuk Bandar.

[183] The learned judge had applied the test in *R v. St Edmundsbury Borough Council ex parte Investors in Industry Commercial Properties Ltd* [1985] 3 All ER 234, in order to determine whether there exists a conflict of interest. There, Stocker J concluded that in a case for judicial review, the test of whether a hypothetical reasonable man would apprehend bias had no application in determining the validity of an administrative decision such as grant of planning permission. The sole test was instead, whether despite its interests or its previous actions, the planning authority genuinely and impartially exercised its discretion, since there are many cases in which a local authority's own interests and land were likely to be affected by a favourable planning decision made by the local authority. In such a case, there would be an "administrative impasse" as described by Glidewell J in *R v. Sevenoaks DC, ex p Terry* [1985] 3 All ER 226.

[184] Stockton J went on to hold that once a planning authority's decision was found or conceded to be fair, there was no requirement to pose some further test by which the decision may be impugned as unlawful or void, either by reference to what the reasonable man would suspect of by reference to whether viewed through some other eyes, such as those of the judge, there was a real likelihood of bias.

[185] This approach differed from that adopted by Webster J in *Steeples v. Derbyshire County Council* [1984] 3 All ER 468; and also of the Court of Appeal of New Zealand in *Lower Hutt City Council v. Bank* [1974] 1 NZLR 545. In the latter case, the Court of Appeal upheld the decision of the first instance court – "that by entering into a contract with a third party to take all steps necessary to stop certain streets, the Council had put themselves into a position that there was a real likelihood that they would feel constrained to disallow objections and that accordingly a writ of prohibition should lie". McCarthy J had found that the Council had fettered its discretion by the contractual commitments and that it would appear to right-thinking people that the Council had done so.

[186] We prefer the approach taken in *Steeples v. Derbyshire County Council* and *Lower Hutt City Council v. Bank*, an approach which was also taken by the Supreme Court in *Anderton & Others v. Auckland City Council & James Wallace Pty Ltd* [1978] 1 NZLR 657. This court's decision in *Dato Mohamad Yusof bin A Bakar & Anor v Datuk Bandar Kuala Lumpur* (*supra*) accords with that approach.

[187] While we understand and appreciate that an 'administrative impasse' may result, that is no answer to the larger principle that there must be compliance to the procedural requirements of law, to the rule of law; that no one is above the law; that the law favours no one; that the rules of natural justice requires not only must justice be done but be seen to be done. These principles are of particular importance in public law where there is a substantial element of public trust reposed on public authorities such as the Datuk Bandar.

[188] From the terms of the JVA, we agree with the submissions of the appellants that there are more than sufficient terms contained therein to fetter the discretion of the Datuk Bandar when it comes to considering the application for planning permission of the proposed development and in securing a development order – see for instance cls. 5.6.1, 5.6.2, 8.1, 9.1.1(a), 10.1(c). These clauses clearly indicate that Yayasan's interests, commercial and financial, were entirely dependent on the proposed development being approved. Without such approval, there would be no joint venture, nothing to develop and no financial gain. Although the JVA was a conditional contract, vacant possession was in fact immediately given to Memang Perkasa upon execution of the JVA, even before the title was issued.

[189] The chronological records of how the development order came to pass, how the process and circumstances of the grant of the development order was facilitated, the details of the JVA and the involvement of the Datuk Bandar, are amongst the paramount reasons why we find further evidence of the existence of conflict of interest in addition to the findings of procedural

irregularity. No matter how the Datuk Bandar attempts to separate or distance itself from the JVA and also from the impugned decision and now claiming in the affidavits filed that the development was to relocate the Bukit Kiara Longhouses, it is undeniable that the terms of the JVA, looked at as a whole, all point inexorably to the existence of a conflict of interest. The obligation or responsibility to relocate the Bukit Kiara Longhouses has nothing whatsoever to do with Yayasan. As said earlier, it is a political issue or legacy, and it is not the Datuk Bandar developing the subject land to attend to this issue. It is a development by private parties, as claimed by Yayasan and Memang Perkasa.

[190] Yayasan, a company registered under the Companies Act 1965, in relation to the occupiers of the Bukit Kiara Longhouses is purely in a contractual relationship with them *vide* master resettlement agreement, entered by virtue of the fact that it is a registered landowner wanting these persons to vacate the subject land for the proposed development. Memang Perkasa then proceeded to apply for the planning permission using the power of attorney given to it by Yayasan. Thus, when the Datuk Bandar claimed that the development order was granted for the sake of relocating the Bukit Kiara Longhouses, it actually lends weight to the allegation that there is a conflict of interest in the terms complained of.

[191] For this added reason, the development order of 13 July 2017 therefore must stand impugned and be set aside.

Conclusion

[192] We are thus convinced for all the reasons deliberated above that there is appealable error in this appeal warranting our intervention.

[193] The appeal is therefore unanimously allowed with costs. The decision of the High Court dated 28 November 2018 is hereby set aside.

[194] We further allow the originating summons in terms of prayer 1.2 in that we hereby issue an order of *certiorari* quashing the decision of the first respondent, the Datuk Bandar granting the development order dated 13 July 2017 in relation to the proposed development on the piece of land known as HSD 119599 PT 9244, Mukim Kuala Lumpur, Bukit Kiara, Daerah Kuala Lumpur.